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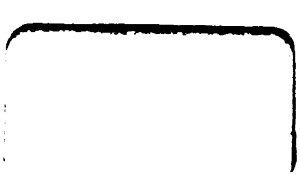

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FOREWORD

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MICHIGAN LAW JOURNAL.

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MINUTES OF THE ANNUAL MEETING OF ASSOCIATION OF JUDGES.

HON. VICTOR H. LANE, SECRETARY AND TREASURER.

The Association of the Judges of Michigan met in its third annual session in Judge Adsit's Court room at the Courthouse in Grand Rapids at two o'clock in the afternoon of Thursday, December 26th, 1895.

The meeting was called to order by President Grove of Grand Rapids, and the reading of the minutes of the last meeting having been on motion dispensed with, the roll was called showing about 20 members to be present.

The Association next listened to the president's annual address with great interest.

Among its recommendations were the following: 1. That the efforts of the association be directed toward the securing of legislation authorizing Circuit and Municipal courts to appoint a crier. 2. That the law requiring the appearance of prosecuting attorneys in certain divorce cases be repealed as of no utility. 3. That the legislature be memorialized to carry out the provision of the constitution requiring the distinction between law and equity practice to be abolished so far as practicable by the passage of a general practice act in Michigan. 4. That all persons who have at any time served on the bench of the Supreme Court or Municipal Courts

of Michigan be eligible to membership in this association.

On motion of Judge McMahon the president's address was referred to the Legislative Committee when appointed to report at our next meeting.

Judge Aldrich, of Cadillac, presented an interesting paper on the "Rights of the People in Criminal Cases." He insisted that in every trial effort ought always to be made to secure a trial on the merits of the case, and, if it appear that a fair trial has been had, it should not be set aside for technical errors. Error in the pronouncing of judgment should not give new trial, but simply require the pronouncing of a new and proper judgment. Doubtful questions of serious import should not take the case from the jury.

Judge J. B. McMahon next read a paper on "The Personal Factor in the Court." This scholarly paper was listened to with deep interest. "The court," he says, "will always be what its presiding officer is. His brain, his heart, his conscience is the heart, brain and conscience of the court. A judge must be something more and better than a digest of 'case law.' The judge who blindly follows supposed presidents will do little to forward justice. Modern text books are written to enrich publishers and not to satisfy a demand. They are in the main mere compilations of decisions with no philosophy in them. The judge should not only have broad knowledge of the law, but be a philosopher, a thinker, a reasoner, an analyst.

The exercise of the authority of the trial judge carries with it consequences the most important and hence lays upon the trial judge responsibilities of the gravest character.

The judge from the bench has large influence with lawyers and juries which ought always to be carefully exercised.

Judge J. W. Donovan of Detroit was unable to be personally present, but sent his paper which was next read by the Secretary, Judge Lane. The subject of this paper was "Can Courts Control Cross-Examinations?" Prolonged cross-examinations are a threefold evil. The weapon of cross-examination is first dangerous to the examiner. It is "playing with a buzz-saw" as Choate declared. In the second place it deters good people from becoming witnesses and for this reason justice is often defeated, and this practice of prolonged cross-examination is a nuisance because of the time it takes. Courts should discourage the practice by every reasonable means. The practice in the English and Canadian Courts furnish us profitable examples in this respect.

Three rules are suggested by way of remedy:

(1) Ask counsel to be respectful; put them upon honor in court work.

(2) Insist that the tedious stand up and in their places while examining.

(3) Protect the witness from insult and check wrangling.

The next paper read was by Judge Corbett of Traverse City on "Disqualifying Opinions of Jurors touching the merits of the particular case." Popular criticism is against the excusing of venire men for such insufficient cause as is now the practice.

It is difficult for a juror to communicate understandingly the degree or nature of the opinion. The juror who reads and aims to keep himself generally informed, should not be excused because he may from such reading have gathered impressions about the case, but only when his "impressions" have grown to "prejudice."

The fitness of the juror ought to be left to the trial court to conclude, and unless there is shown an abuse of the authority, the exercise of it ought not to be subject to review. His opportunities are in so many particulars better than those of the court or judge who has no opportunity to see the juror himself. Recent legislation and adjudication are tending toward the acceptance of jurors if it is made to appear that the previously formed impressions or opinions will not influence or bias their verdict.

These various papers were next thrown open for general discussion.

Judge Burlingame thought thirty peremptory challengers for defendant and fifteen for the people were too many in any case; that ten were enough. He also thought jurors ought to serve longer and thus not require the education of new men to the duties of jurors so frequently.

Judge McMahon opposed this last suggestion as apt to exclude the man with business interests from jury service.

Judges Daboll, Buck, Hubbell, Maxwell, Hosmer, Moore and Lane took part in the interesting discussion which followed the submission of the foregoing papers.

An adjournment was taken, following this discussion, to 7:30 in the evening.

At the reassembling at 7:30, a paper was presented by Judge Maxwell of Bay City, on "Some Defects in the Tax System of Michigan." Judge Maxwell insisted that our present system was the relic of an age long since outgrown. That it resulted in gross inequalities

due largely to the ignorance or want of integrity in assessing officers. He advocated a submission of assessments to the courts for approval and correction before the levy is completed.

Judge Hubbell agreed with the writer of the paper that there ought to be some supervision of the assessment before the levy is complete.

Judge Russell thought the courts had too much to do with taxation already.

Judge Daboll read a paper on "Limiting Appeals from Courts of Justices of the Peace," which was full of practical thought from a practical man.

Judge Daboll advocated that appeals be limited to cases involving a judgment of not less than $20.00, and he thought the amount ought to be larger.

Judge Hosmer thought, that much that was annoying and evil in the courts of Justices of the Peace, would be eliminated by making those officers salaried officials instead of compensating them for services on the fee system.

On motion of Judge Maxwell, Judge Daboll's paper was referred to the Committee on Legislation when appointed.

The last paper of the evening was prepared by Ex-Justice Benj. F. Graves of Detroit, and bore the title of "Some Observations in regard to the Status of the Bench and Bar in our American Civilization." This paper excited the most favorable commendation from the judges of the association.

Judge Graves called attention to the fact that lawyers were fitted by education, and the experience incident to the exercise of his profession to leadership, and as a leader he has always been regarded. His services to our country could scarcely be estimated. The lawyer insists upon government by law. There is danger with our extreme democratic ideas that the fiercer and more tempestuous elements in our society bring disaster, and the conservative lawyer is regarded by the students of our institutions as the counterpoise for these discordant elements.

Historical illustrations of this truth were given, drawn from the early days of our republic. The circumstances surrounding the formation and adoption of our Constitution and the financial questions developed out of the circumstances that followed the war of the Revolution, affecting the status of individual debtors among our people, and the people of Britain were settled in accord with right and justice through the efforts of members of the legal profession.

Our system of government is being assailed to-day by alien and crazy ideas and conduct born of ignorance and misrule. Upon the Bench and Bar in this day is grave responsibility.

On motion of Judge Hubbell the following resolution was adopted:

Resolved: That the association regards the paper of Hon. Benj. F. Graves too valuable to be "covered by the confidence of the association" as requested by him, and request that the paper may be used for publication.

The association thereupon adjourned to 9 o'clock Friday morning, December 27.

On assembling at nine o'clock on Friday, Dec. 27th, the association listened to a paper by Judge Person of Lansing on "How Far is the Trial Judge Responsible for Bad Verdicts."

Judge Person argued that much depended upon the success of the judge in eliminating from the mass of material, more or less important in the case, that which makes up and illustrates the real issues and presenting these to the jury so that there can be no mistaking them. That to this end the trial judge ought to use great care and patience. The judge able to present clearly and sufficinctly the issues in the case and who can clearly state and apply the rules of law applicable to their solution will have few unreasonable verdicts in his court.

This paper was discussed by Judges McMahon, Daboll, Buck, Maxwell, Aldrich and Burlingame.

Dean H. B. Hutchins read a carefully prepared and scholarly paper on "Preparation for the Bar Considered from a Professional Point of View."

No adequate idea could be given in any abbreviated statement of its contents, of the real merit of the paper. It was a masterly argument in view of the importance to the public and the individual of the profession of the law that broader and more complete preparation be made for its practice.

Most favorable comment was made on this paper by Judges Maxwell, Buck, McMahon and Hubbell.

On motion of Judge Russell the Legislative Committee were directed to investigate and report at our next meeting whether some place is not needed for the incarceration of young criminals who are so incorrigible as to be rejected by the Boards of Control of our Industrial Homes, with such recommendation as may be deemed wise.

The invitation extended by Hon. Roger W. Butterfield on behalf of the committee of the Bar Association of Grand Rapids to a drive about the city, and incidentally to visit some of the manufacturing

establishments of the city, was accepted.

On motion of Judge Palmer a resolution was adopted tendering the thanks of the association to State Reporter Hon. W. D. Fuller, for the careful and efficient manner in which he has discharged the duties of his office, and particularly for the feature adopted by him of annotating the decisions.

The report of the Treasurer was received and adopted, showing amount on hand to be $47.17.

The election of officers next followed, resulting in the choice of Sherman B. Daboll of St. John for President, John H. Palmer of Big Rapids for Vice-President, Fred. H. Aldrich of Cadillac for Secretary and Treasurer.

A resolution was adopted authorizing the appointment of a legislative committee of three, and such other committees as may be deemed necessary at the convenience of the president.

The next meeting of the association was fixed for Detroit on the Tuesday preceding New Year's day, 1897.

On motion of Judge Adsit, all judges who have at any time sat on the benches of the Supreme, Circuit or Municipal Courts of Record, were invited to become members of the association.

On motion, the thanks of the association were extended to the citizens and Bar Association of Grand Rapids for their cordial hospitality so freely extended to this association, and to Judge Adsit for the use of his court room for the meetings of the association.

On like motion, the thanks of the association were tendered Dean H. B. Hutchins and Justice Benj. F. Graves for their able papers read before the association.

The customary vote of thanks was also extended the retiring officers of the association for the services rendered to it during their terms of office.

The association thereupon adjourned *sine die* and in the afternoon its members enjoyed a ride about the city, and in the evening attended a banquet tendered by the Bar Association of Grand Rapids at the St. Cecelia Club.

THE PERSONAL FACTOR IN THE COURT.

HON. JAMES B. McMAHON.

A court is defined by Coke as "a place where justice is judicially administered." Blackstone, and indeed, most other legal authors, adopt this definition which makes a court a *place* where justice is administered, rather than the power by which it is dispensed. This definition follows easily from the derivation of the word court from the French *cour*, Dutch *koert*, or Latin *curia*, originally used to designate the court-yard of the baron or the king where the administration of justice found its earliest tribunals assembled by the summons of the king or feudal authority.

The word "court" came in time, however, to be used somewhat indiscriminately, sometimes to designate the place where the court assembled, sometimes an abstract corporate entity, and sometimes its presiding officer or officers, but, of course, such an indiscriminate use of the word to designate either a person or a place is at least a free metaphor, if not a solecism. In truth neither use of the word is strictly correct, for a court is neither a place nor a person, but a corporate agency of the supreme governmental power by which its laws are interpreted, and applied to the furtherance of justice. To be an efficient and operative agency it must, of course, have a definite place for its meetings, and must have a presiding officer by whom its orders, judgments and decrees shall be announced and promulgated; but since the place of its meetings may be changed, and its presiding officer may resign, or die, or be removed from office, without destroying the existence of the court, it follows that these things are not necessary to its actual existence, and therefore have no necessary place in its definition. This reasoning is theoretical, but it will appear, of course, that to be the efficient organization of a court as a working force the existence of a definite situs, and of at least one presiding officer are essential, and, indeed, indispensible prerequisites. For in actual affairs the presiding officer of the court, the judge, is the life of the court. His brain, his heart, his conscience, are the brain, the heart, the conscience of the court, and, since this is so, it is evident that it must always be a matter of the utmost import to inquire what manner of man he is. For, theorize

as we may, it is nevertheless evident that in practice the presiding judge is the court, and it is the fundamental proposition of this thesis that the court will always be what its presiding officer is. This proposition, with a few of its obvious corrolaries, will be the theme of what I have to say.

First let us examine the proposition that, practically speaking, the presiding judge is the court. It is obvious that he absolutely controls its procedure. Its judgments, orders and decrees are the product of his brain. The stream cannot rise higher than its source. The wisdom, or unwisdom, of the judge will be reflected in these judgments. The rights of persons and of property within the territorial limits of the jurisdiction of the court are at his disposal. If he be ignorant of the science of the law and the art of its application, that ignorance will, in large measure, be displayed in the results of his labors. The administration of justice will be loose and uncertain, guided by caprice, and founded upon no known and general principles, and will become more or less of a lottery. I need not argue before this audience that the ideal presiding officer of a court should be a man of large attainments, especially that he should have a deep and well-grounded knowledge of the law; but permit me to enlarge upon this aspect of the subject for a moment. The judge should, of course,be a well-read lawyer, as the terms goes; but let me protest that by this I do not mean that he should be a walking encyclopedia of case law, a digest of cases. I have known in my experience at the bar a few men of omniverous memories, loaded down with case-law, who have been placed upon the bench, and in every instance they were failures as judges. Such men acquire, insensibly, perhaps, but surely, a dependent habit of mind. They have no independent judgment. They cannot walk without the crutch of a precedent. They snatch at a case in point as a drowning man is said to catch at a straw, and until a supposed precedent is found they flounder helplessly in doubt and distress. Such a man on the bench is dangerous. He is a fetich-worshipper. "Cases illustrate principles, but do not create them." Each case must be decided upon its own merits and facts, and precedents are of value only as finger-posts to point the way to the deep, underlying principle by which each case should be controlled.

Too much case law is the curse of the profession. In earlier times when precedents were being made, rather than followed, I am inclined to think the practice developed better lawyers, and the bench better judges.. Every principle of law has a history, and is

the result of the common sense of mankind applied to the circumstances of their environment. Each principle of the law represents the results of a struggle toward a better adjustment of princple to the actual facts of life, and no man can be a great lawyer who does not look behind the cold formula in which it is phrased to the actual and vital principle of life which lies behind it, and which gave it an existence. In the early days in trying and deciding cases lawyers and judges were compelled to be philosophers, to examine the histories of the principles for which they contended, to rely upon broad, human common sense, and the fundamental and basic principles which underlie the law and are the reason and excuse for its existence. I am by no means sure that it would be a misfortune to the profession if ninety-nine per cent of the law books, both reports and text-books, were to be destroyed. The reports have a field for usefulness, but they are too often abused. They are too often blindly followed as finalities, and as helps for intellects too indolent to find the way for themselves, and the judge who blindly follows supposed precedents will do little to forward justice, and will err more frequently than one who cares too little for them, and relies almost entirely upon his own sense of right. The text books of the law in these modern times are, generally speaking, of little value, except as digests. They are written to enrich the publishers, and not to meet any real demand. Many of them are written by men of no great learning in the law, and are mere compilations of decisions, undigested, unreconciled in principle, and with no philosophy in them. They are the bare bones and skeletons of the law, unvitalized by any life from the author, and are useless, if not misleading. I would like to inquire of my brethern how many really philosophic books on the law have appeared to their knowledge since Cooley's Constitutional Limitations was written.

But, in addition to a broad and philosophic knowledge of the law the ideal judge must be more fully equipped. He should also be a philosopher. No man can memorize the law. Its tendency is toward progressive integration. Legislation and judicial decisions are steadily reducing the body of the law to a heterogenous body of definite rules. This is in accordance with the laws of cosmical evolution, of which, indeed, it is a part; but if blindly followed by the judge or practioner tends to make of him a mere memorizer of legal formulae. The demand of the time is a philosophy of the law which shall reduce the complex phenomena with which jusisprudence has to deal to a system of fundamental and ultimate truths and precepts,

and unify our knowledge. And, indeed, even now, the successful judge is he who has the philosophic insight, who can find his way through the tangled labarynth of precedents to the clear, ultimate principle upon which the decision of each case must finally rest. The judge, therefore, must be a philosopher, a thinker, a reasoner, an analyst. Being this he will succeed, though his memory be not overburdened with precedents, and lacking this analytic power he will fail, no matter how many cases he may carry about in his head for future reference. What the bench demands is sense, tact, judgment, and that indispensable faculty of analysis by which each case as it arises may be catalogued, and referred to its controlling principle. This faculty of generalization can be cultivated, and as by it alone can any man hope to attain to that power and breadth which are indispensable to the successful judge, I am of the opinion that one of the best preparations for a judge's work would be a careful study of some complete system of philosophy. By this I mean not merely one or two branches, such as metaphysics or ethics, or sociology, but a complete system. Lord Bolingbroke, as long ago as the early part of the eighteenth century, insisted that metaphysics must form an important part of the education of every lawyer, for the reason, as he argued, that no man could successfully practice the law without understanding the sources and springs of human action as revealed by pscychology. He did not insist upon other branches of philosophy, probably for the reason that other branches were then little known; but surely the well equipped lawyer will not neglect so important subjects as ethics and sociology. To follow out this plan I am aware involves a good deal more labor than is usually devoted to a preparation for the profession of law, but the effort will be more than compensated by the gain in athleticism of intellect, and in that infinitely wider view which makes of jurisprudence what Ulpian in the third century defined it to be: "The knowledge of things human and divine, the science of the just and the unjust," and of its followers what he claimed for himself and his brethren: "The priests of justice, engaged in the pursuit of a philosophy that is truly such, and no counterfeit."

I am aware that my ideas will seem to some, perhaps, visionary. Some will say that I am placing the mark too high; but what can be too high a qualification for the exalted responsibilities of the position we occupy? It has seemed to me that we cannot expect to gain any great increase of our knowledge of the law at these annual meetings. Two days in the year are hardly sufficient for the purpose,

but the inspiration of a lifetime may be seized in an instant, and what we gain here, if anything, must be inspiration, exaltation of purpose and outlook. Let us consider, then, the weight of the responsibilities of a judge of a *nisi prius* court for a moment. It is true that many of his decisions can be reviewed as to questions of law, but poverty of the litigants frequently prevents them from appealing. On questions of fact an appeal is useless in law cases, and, when they are heard in open court, nearly so in chancery cases. The responsibility resting on the judge, therefore, is very great. In the great majority of cases which he hears his decisions are final, and dispose of questions affecting liberty and property for all time. Is it possible that he can in any case bring too much of learning, or too fine a nature to his task? Consider also how many questions of tremendous importance are addressed to the discretion of the court, and are not reviewable. Two or three instances will elucidate more clearly the force of the proposition. Suppose the case of a young man of previous good character who has been convicted of a felony, and is brought before the court for sentence. The statute in the case, we will suppose (a by no means impossible case) leaves it entirely in the discretion of the court to sentence him to any term of imprisonment from one hour in the county jail to ten years in the State Prison. There is no appeal from the exercise of this discretion, and yet of what terrible import is it to this unfortunate young man and to the commonwealth that the discretion be wisely exercised. How frequently it happens that the allowance or denial of a preliminary injunction makes to one or other of the parties litigant all the difference between prosperity and financial ruin! If it is granted mistakenly it often ties up property and enterprise until the defendant is utterly ruined. If it is mistakenly denied it often transpires that all the available property of the defendant is effectually sequestered, and the complainant is left the cheerless option of discontinuing all efforts to obtain redress, or pursuing to its fruitless end a barren and purely formal remedy. Or, to cite an instance of perhaps still greater moment, it often happens that the courts are called upon to decide in actions for divorce or on writs of *habeas corpus* the question as to which of two parties litigant shall have the custody of children of tender age. The questions thus presented are largely discretionary, and can seldom be effectfully reviewed; and yet of what transcendent importance to the parties, to the state, and especially to the innocent subjects of the litigation are the matters to be passed upon. They involve all the possibilities of life and death,

of future usefulness and happiness, or moral bankruptcy and ruin. Whatever the theory upon which the court is organized it may be the decision of all these questions rests with one man, and they depend entirely upon his wisdom or unwisdom. Can he be a man of too great integrity? Can he bring to the solution of such questions too great an education either of the head or of the heart? It is obvious that a mere education of the intellect will not suffice. He must be a man of broad sympathies. He must be educated in the soul as well as in the head. He should be a man of tact and judgment. One educated in the great school of humanity.

There is no other influence so subtile and so forceful as that of a strong personality. A great character will modify all its surroundings, and bring them up to its own plane. Nature's noblest handiwork is a strong, fine character, and for this she will gladly subordinate all else. Institutions may rise and fall, but they were made by man, and shall be created anew whenever a sufficient man arises. There is no force in all the world to be compared to the force of a strong individuality. It impresses itself upon all its surroundings. It is to a great extent independent of accessories, and is a compelling force in life; and in few places will a strong character be more forceful and influential than on the bench of a *nisi prius* court. A man in that position who is amply equipped and equal to his work, and who does it with reverence and enthusiasm will leave his impress in a thousand ways obvious and remote. Perhaps the most noticeable effect of his influence will be seen in the bar. A strong character on the bench will effect the characters and conduct of all the attorneys who practice before him. If he is a whole man, of ample learning, of rugged honesty, of untiring patience and industry, you shall see these virtues reappear in the lawyers who practice in his court. It requires a great deal of impudence and moral perversity to approach such a man with a falsehood. All poor subterfuges and shams seem mean and pitiable in the presence of his clear, sincere and masterful directness, and they fall away even from their habitual devotees. The bar will be more or less like the judges before whom it is brought to practice. Few men have the hardihood to appear before an honest man habitually, and day by day, with lies and evasions on their lips. The moral atmosphere of the court room in which sits a whole and complete man will stifle fraud, subterfuge and indirection. Even the poor motive of policy will be against deceit and the dealing in half truths. I have even noticed in going into circuits where a judge of strong character and high

purposes presided that the attorneys had unconsciously acquired even his mannerisms. They studied carefully his habit of mind. They knew that a case which had equities in it was half won when it was stated, and they knew that no stone wall of legal logic could stand in the way of a righteous judgment.

But there is another direction in which the influence of a strong character on the bench will make itself felt even more positively. In these days it is fashionable to rail at juries, and to belittle their functions and usefulness. Such a course can have no other result than to help to make true the evil prophecies of the ill-disposed. The jurors know at the outset that they are discredited, and do not feel the responsibility and dignity of their position. A judge of masterful character will do much to overcome that unfortunate tendency. He will impress jurors with the fact that they are a branch of the court; that their functions are as important for the time being as his own; that the whole machinery of justice depends for the time for its efficiency upon the fidelity and faithfulness with which they discharge their duties. He will not fail to impress them with the dignity and importance of the position which they hold. He will elevate and ennoble it, and the jurors, if they are men of ordinary caliber, will not fail to appreciate it, and will endeavor to rise to the requirements of the occasion. It is always noticeable to a careful observer that the jurors are always anxious to please and co-operate with the court. They like to feel that they are partners with him in the administration of justice, and fully appreciate a recognition of their importance in the affairs of the court, and will readily respond to cordial and generous treatment. If they see in every detail of the business of the court that the judge is a man of great sincerity and earnestness, they will catch the same spirit, and will perform their duties with much of the same intense devotion to truth and justice. The judge should at all times impress upon the juries attending his court in his charges the solemn responsibility which rests upon them; that their findings of the facts are final and conclusive; that they are not called in merely as arbitrators to jump at equitable conclusions, but that the affairs of men who have differences should be settled according to the broad and general principles of the laws of the land. A frank and cordial understanding between the court and the jury of their mutual relations will do infinite good in the affairs of the court. Again, the influence of a strong and virile character on the bench will make itself felt throughout the community. No greater misfortune can befall the state than a loss of confidence on the part

of the people in the integrity and efficiency of the courts. When this occurs the way is open for violence and mobs. A court properly conducted is a school in which daily lessons are given in the exalted fields of patriotism and reverence for the laws. In no place can the influence of a wholesome character be more conspicuous and salutary, and in no place are weakness, obliquity, and inefficiency more pitiable and contemptible.

The sum of the whole matter is that to the duties of this high office no man can bring too much of learning, of tact, of consecration. Every duty should be approached with high purposes, and entire devotion to the highest that is in us. To be the ministers and priests of justice, to keep the fires alight on her sacred altars, this is indeed a service of the highest kind to humanity and to our country. As the law is that by which the rights of every citizen are conserved and guaranteed, and the commonwealth is rendered secure, it follows that to promulgate that law in its purity, and to enforce its edicts is a prerogative that affects the safety and happiness of every citizen, regardless of religious creed, or accident of birth, or political affiliation, and therefore it follows that no other pursuit accessible to man's ambition is at once so important and so honorable. I firmly believe, and fearlessly assert that during its whole history the men who have presided in the several courts of Michigan have been exceptionally able, honorable and learned. Lawyers from other states practicing occasionally in Michigan have often remarked it. The reason is perhaps to be found, in large measure, in the fact of the high average intelligence of our people, and their freedom from the rule of the professional politicians. It is no doubt true that there have been cases in Michigan even where our system of selecting judges, by which they are made dependent upon the caucus, the convention and the popular election, where the best man has not been chosen for the bench; but on the whole the results have not been bad. We point with infinite pride to our Cooley, Campbell, Christiancy and Graves on the Supreme Court bench, and it would not be difficult to enumerate the names of a score or more of men who have added undying honor to the bench of our *nisi prius* courts throughout the state. It may not after all be an unmitigated disaster to the state that the salary attaching to the position of a Circuit Judge is so small as to make the place of little value to the professional, wire-pulling politicians. I can hope for no better result from these meetings than that we may gain therefrom higher purposes and sturdier courage, that we may add something to the structure which

the fathers have builded so wisely and so well. There is nothing in life that will so absolutely insure success in any calling as entire devotion and consecration to it. We must love our work, and do it with our might. We must touch every task with reverent hands. It is as certain as anything can be that the man who comes to his work in this spirit will succeed; and it is equally certain that the man who spends his time in repining that his salary is not larger, and insisting that he is not appreciated at his true worth will miserably fail. Love and enthusiasm are the golden keys to which all doors gladly open.

REPORT OF THE COMMITTEE OF THE DETROIT BAR.

To the Members of the Detroit Bar:

Your Committee heretofore appointed by this bar to determine upon the necessity for a revision of the rules and practice of this Court and of the Supreme Court, so far as we are affected by the same, beg leave respectfully to make the following report:

We find in Sections 6409 and 6416 Howell's Statutes, ample power to give immediate relief in respect to several matters that active practitioners fully recognize the injustice of. Your Committee respectfully submit that not within the memory of any of its members has there been such a revision of the rules of practice of the courts of this state as is comtemplated by this statute, which provides that once at least in every two years, the Supreme Court shall, if necessary, revise the court rules with a view to obtaining, so far as practicable, certain improvements in practice. Some additional rules have been framed where great injustice has challenged the attention of the court to existing deficiencies, but no general revision that we are aware of has been made since a period prior to March 19th, 1858.

The object of the statute plainly contemplates a biennial revision, and makes it the duty of the Supreme Court to provide therefor, the main object being the simplification of the practice looking to the abolition of distinctions between law and equity; the simplification and abbreviation of pleadings and proceedings; the expediting of the decisions of causes; the remedying of abuses and imperfections in practice; the abolishing of all unnecessary form and technicalities in pleadings and practice; to prevent defeat or abatement of any civil suit or contract for either non-joinder or mis-joinder of parties, for amendments and for discontinuances and the bringing in of parties to suit.

Again, believing that the student and young practitioner should not be hampered with a quantity of obsolete material to be learned as law and to be unlearned by practice, your committee has gone through the Circuit Court Rules to detect the dead timber therein and to make suggestions as to what they believe demands immediate

relief. As to such suggestions as apply to Wayne County exclusively, and which it is within the power of our own court to adopt, (and we believe this power is ample under the act creating additional judges for Wayne County) we ask early consideration.

We also recommend the appointment of a committee from this bar to lay before the Supreme Court our requests for a revision on the lines here indicated, and we ask the concurrence of our circuit judges thereto.

Juries. First, we recommend that the Jury Commissioners be instructed to return the names of one thousand men qualified to sit as jurors for the year beginning in May, 1896, and ending in May, 1897, and that instead of seventy-two jurymen being drawn for a term, there should be as many times seventy-two as there are months in the year in which court is in session divided in monthly classes, to be summoned for appearance on the first Monday in each month of jury duty, the courts thereby getting, as we believe, better service from new men coming fresh from the people, and all properly qualified persons, being thereby permitted to take part in the enforcement of the laws of their country. The duties are burdensome in this manner to no one, and will not be reserved to a class who deem themselves fortunate to get the situation, thus practically excluding the business man, mechanic and man of affairs. We respectfully recommend that our Circuit Judges be requested to adopt this plan for at least one year, believing there is ample authority therefor in the *Public Acts of 1893, Sections 6 and 7, page 204.*

Circuit Court Rules 1, 2 and 3 apply to the examination for admission as attorneys, the requisites of petition for examination, and proceedings on admission of attorneys, both in the Circuit Court and in the Supreme Court. The repeal of these rules is recommended, for the reason that the entire subject is covered by the legislation of this state.

Rule 4 provides: "Every attorney shall have an agent in each place where there is a circuit court held in this state, except in the city or town where such attorney keeps his office. No person shall be an agent unless he be an attorney of the court, clerk of the court, or deputy clerk. The appointment of agents shall be made in writing, signed by the attorney, and filed in the clerk's office; and the clerk shall keep a catalogue of the appointments filed in the office, with the attorneys' names alphabetically arranged."

We are aware of no circuit in this state in which this rule is enforced or is observed in the slightest degree. It is practically a

dead letter, and might as well be abolished.

Rule 28 now provides: "In all cases of special motions, except a motion for continuance, the affidavit and other papers on which the same may be founded shall be filed at the time of entering the motion, and copies thereof shall be served on the attorney of the opposite party on or before the day of entering such motion, unless further time is granted."

We would recommend that this rule be amended as follows: Insert after the word "continuance" second line, the words, "the motion and." Strike out the words "at the time of entering the motion" in the third and fourth lines, and insert after the word "party" the words "four days before such motion is heard." The rule as then amended would read:

In all cases of special motions, except a motion for a continuance, the motion and the affidavits and other papers on which the same may be founded shall be filed, and copies thereof shall be served on the attorney of the opposite party four days before such motion is heard.

Rule 29 provides: "The clerk of every Circuit Court shall provide a book, to be denominated the "special motion book," in which all special motions shall be entered, except motions for continuance. In entering a special motion, all the grounds upon which the same is founded shall be briefly but distinctly set out; and in all cases the motion shall be entitled, dated and signed by the attorney or counsel of the party in whose behalf the same is entered. Such motions shall be heard in the order in which they are entered, unless otherwise ordered."

We would recommend that the Supreme Court be asked to suspend Rule 29, or, at least, to do so in so far as it applies to Wayne County.

Rule 30 provides: "No motion which is resisted shall be argued on the day it is entered without the consent of parties, unless the court, on good cause being shown, otherwise direct."

Inasmuch as it is necessary to give written notice of all motions which are contested and are to be argued, this rule seems entirely unnecessary.

Rule 31 provides: "Motions for new trial, with the reasons on which they are founded, shall be made within two days after the rendition of the verdict, in the case of a trial by jury; and where the cause has been tried by the court, two days after the decision of the court. And if two days in the same term do not intervene after such

verdict or decision, such motion shall be entered on or before the first day of the next term."

We suggest that Rule 31 should be amended by making the time of notice five days instead of two in every instance, and that this amendment should also apply to Rule 33, referring to motions of arrest of judgment.

Rule 66 provides: "When the defendant in any action founded on contract shall plead in abatement, the non-joinder of any other person as defendant, the court in term time, or the judge in vacation, may, at any time before issue joined on such plea, allow the plaintiff, on such terms as the court or judge shall prescribe, to amend his declaration by inserting therein the name of any other person as defendant, and declaring against him jointly with the original defendant."

We believe that this rule and Rule 67, providing as to how the defendant shall be brought in, should be so amended as to allow the plaintiff to bring in the defendant not joined or originally sued by some short process.

We also strongly urge that Rule 71 be so ammended as to read as follows:

Rule 71. When an action founded on contract is brought against several persons, a verdict and judgment shall pass against any defendant sued whom the jury and the court may find liable as a matter of fact and law, whether it be one or any number of defendants sued, the plaintiff being liable for costs to the defendants acquitted. But no plaintiff shall be forced to become non-suited or have a verdict and judgment pass against him in an action on contract, where it is shown by the evidence that he has a cause of action against any defendant properly before the court, notwithstanding that the plaintiff may have declared upon a joint allegation against the defendant.

The verdict and judgment may be a several one.

We deem it a matter of criticism that in the present advanced age, the condition of our law has been for fifty years such as to compel the rendition of such judgments as here cited, all being cases where litigants have been defeated in the highest court of this state because of too many defendants being sued.

Humn v. *Hayes*. *46 Mich., 143.*

Mace v. *Page*. *33 Mich., 38.*

Larkin v. *Butterfield*. *39 Mich., 234.*

Wellever v. *Soule*. *30 Mich., 481.*

Van Leyen v. *Preston*. *81 Mich., 606.*

Anderson v. *Robinson*. *38 Mich.*, *407*.
Lee v. *Bolles*. *29 Mich.*, *46*.
Ballen v. *Hill*. *23 Mich.*, *80*.

Rule 91 refers to what attorney fees are taxable.

Rule 92 refers to additional clerk's fees.

Rule 93 refers to double and treble costs in cases of tender or payment.

Rule 91 was expressly repealed by Act Number 58 of the laws of 1867, being an act to repeal all existing laws, rules and provisions of law restricting or controlling the right of a party to agree with an attorney, solicitor or counselor for his compensation, and to more accurately fix and determine the costs to be allowed to the prevailing parties in suits at law in the Circuit Court," and amended by Act Number 28 of the laws of 1869.

Inasmuch, therefore, as this rule is entirely supplanted and repealed by the statute referred to, it should be dropped from the book of rules.

Rule 97 provides: "The party having the affirmative of the issue, and bringing the cause to trial or hearing, shall prepare an issue roll, containing a copy of the pleadings, and any notice or set-off or special matter of defense which may have been given under the general issue, and such roll shall be used on the trial or hearing instead of the original files in the cause; and such original files shall not be removed from the clerk's office, to be used on such trial or hearing, without the special order of the court."

Rule 98 provides for the costs for issue roll.

Believing that these two rules last cited are never used and are a dead letter, we recommend that they be abolished.

Rule 100 provides: "A *scire facias* shall not be necessary to revive a judgment after the death of either party; but in lieu of such writ, a motion may be made, upon affidavit and notice, to revive the same; and an order of revival made upon such motion shall have as full force and effect as if proceedings had been had by *scire facias*."

The necessity of such rule is entirely done away with by legislation. See *Howell's Statutes, Sections 7393, 7394, 7395, 7396, 7397, 7401, 7402, 7403, 7404, 7405, 7406, 7408, 7409 and 7415*. And as to actions in ejectment, *Sections 7817 and 7886*.

We believe that the object sought to be reached by this rule is better covered by Rule 165, which provides for the suggestion of the death of a party and a revival, and it would seem that this was a complete substitute for Rule 100.

Short Cause Docket.

It is apparent to your Committee that there are a great many cases on the docket of the Wayne Circuit Court of such a character as might be easily eliminated therefrom, and the docket thus cleared for more certain, prompt and intelligible action by the adoption of what we may term a "Short Cause Docket." This method is in vogue in many states, and has proven most efficacious. The rules which we here recommend for adoption, with such changes as further light and experience may suggest, we believe will be received with favor and be a decided addition to our practice.

Rule ..... In addition to the regular trial docket, it shall be the duty of the Clerk of the Circuit Court for Wayne County to prepare a trial docket which shall be known as a "Short Cause Docket." Upon the plaintiff or defendant, either in person or by agent or attorney, in any suit at law pending in this court, filing an affidavit that he verily believes that the trial of said suit will not occupy more than one hour's time, and upon ten days previous notice to the opposite party, his agent or attorney, said suit shall by the clerk be placed on the "Short Cause Docket."

Rule ..... The court will designate one day in each week during every term, or so much thereof as may be necessary, for the trial of causes on the "Short Cause Docket," and all such suits shall be tried and disposed of on such days in the order in which they were placed upon such docket. Suits once placed upon it shall remain thereon until disposed of in their order. No cause shall be noticed for trial on such "Short Cause Docket" until the same is at issue. All notices to place a cause on such docket must be filed with the clerk within two days after the service of the same, and not later than ten days before the date on which the case is set for trial. The presiding judge may assign to each judge for each week, in their order on the "Short Cause Docket," any cases that may be properly thereon.

Rule ..... If the trial of any suit which is upon the "Short Cause Docket" shall occupy more than one hour's time, then the court may, in its discretion, stop the trial, take the case from the jury and continue it, and the suit shall go to the foot of the docket and shall not again be placed upon the "Short Cause Docket" and if placed thereon at the instance of the plaintiff, the plaintiff shall forthwith pay all costs incurred to that time, and in default of such payment the suit shall be dismissed at plaintiff's costs, and if placed thereon at the instance of the defendant, the court shall impose an

additional cost, viz: $....., and may, in its discretion, strike the cause from the "Short Cause Docket," and set the same for trial on the regular docket without further notice.

Rule ..... A suit upon the "Short Cause Docket" may be passed or continued for good cause shown, the same as other causes, and if so passed it shall lose its place upon such docket but may be again placed thereon.

Rule ..... If a suit which is on the regular docket shall be placed upon the "Short Cause Docket," it shall be stricken off the regular docket, and shall not again be placed thereon except by order of the court on cause shown.

Rule ..... All notices for trial of causes for the "Short Cause Docket" shall have endorsed thereon the words "Short Cause Docket."

Rule 76 provides: "All cases not disposed of at any term shall stand continued to the next term, and shall be considered as continued from term to term, until finally disposed of, without any special entry of continuance."

We believe that the present system, so far as it applies to Wayne Circuit Court at least, of repeatedly noticing cases for trial which have been once placed upon the docket, is a useless waste of time and labor, and could be easily disposed of were the power conferred by Rule 76 properly and fully exercised.

Decisions.

Although the laws of 1895 permit decisions by Circuit Judges to be handed down at any time within six months, yet we respectfully ask our judges to decide all matters submitted to them, where their personal decision is necessary, within thirty days from the time the case is submitted, believing that one of the greatest merits of judicial action is that remedy and redress be speedy.

Exceptions During Trial.

It has been the practice in this court to take exceptions to the rulings of the court and that the stenographer should note the exceptions down, the bill of exceptions being settled upon the exceptions so taken. We would recommend, as being more convenient and also saving time in the trial of causes, that to all rulings of the court to the admissibility of testimony or otherwise, to which counsel have objected during trial, the stenographer shall note an exception and it shall not be necessary for counsel to take such exception,

and that all contra rulings to which objections have been made shall be considered as excepted to by the counsel against whom they are made.

This practice is in vogue in several of the state circuits, and we recommend that the judges adopt the same practice here.

Many other suggestions occur to your committee, but we believe the matters herein referred to are matters that need no argument to convince the lawyer of their great importance. We do not promise to speak, nor do we seek to have the bar of Wayne County speak for the entire bar of this great state, but we do aver that in our own experience we are convinced of the need of the suggestions herein contained, not only for our bar, where the subject is local, but for the whole state where the general practice is affected, and we bespeak the cordial support of the many able and learned members of the bar of this state to aid us in speedily achieving the ends desired in the foregoing report. Reiterating our belief that the practice of law is for the attainment of substantial justice, speedily, and not for the display of the curious knowledge of the special pleader, and speaking for this large metropolitan commercial centre, we believe the good will of our citizens will be best gained by simple, direct methods of procedure which end in the attainment of speedy justice, in preference to any complicated system of pleading and practice often leading to miscarriage of justice, no matter if it does not cultivate subtilty of reasoning as well as the last mentioned system.

We believe as members of the bar and practitioners of the court, it is our duty to lay such suggestions as we have before you, and ask your hearty co-operation with them, and also ask from you such further suggestions as in your wisdom you believe to be necessary.

Respectfully submitted,

(Signed) JAMES H. POUND.
" SAMUEL T. DOUGLAS.
" HENRY M. CHEEVER.
" THOMAS SPENCER JEROME.

I am not prepared to concur in all the recommendations made, but many of them are excellent and are worthy of examination and adoption. (Signed) J. J. SPEED.

I concur in the foregoing except as to proposed change in reference to service of jurors. I am inclined to the view that if the present law is fairly observed, we will secure good juries; in fact, they have been improving almost with each term, and I believe that experience gained by service is of great value, and adds to the efficiency of jurors. (Signed) ELLIOTT G. STEVENSON.

CAN COURTS CONTROL CROSS-EXAMINATION?

JUDGE J. W. DONOVAN.

A three-fold evil that the courts meet with daily, is the practice of a prolonged cross-examination, especially by the younger attorneys. Experienced advocates have learned to believe with Rufus Choate and Benj. F. Curtiss, that this court weapon is too dangerous to handle very often, and never should be used as an experiment. Choate compared cross-examination to the playing with a buzz-saw and advised never to meddle with it, especially never cross-examine a woman. Curtiss would only examine briefly and never expect to gain a case by the other side's witnesses. But lawyers are slow to learn such lessons.

The second evil of cross-examination tends to deter good people from being witnesses. They have a wholesome dread that they are put to torture and made to reveal many private dealings and personal affairs which should remain state secrets. This horror and dread of badgering attorneys, prevents many a good woman from appearing in court, who would otherwise willingly testify to facts that might promote justice and secure punishment to the brutal husbands who treat their wives and children worse than slaves should be treated.

The last evil is the eternal nuisance to the court and cause—the intolerable bore—the long drawn out delay in trials—the time lost and issue obscured by some self-conceited lawyer who aims to show off in cornering a witness by a long serious of irrelevant matters intended to confuse, rather than clear up an issue. It is not intended by this to prevent a brief examination which may correct slight errors of dates, lay a foundation for impeachment, or test the bias, or means of the witnesses knowledge and information—these inquiries are all legitimate, but they are often so long and tediously drawn out, or done in such boorish methods, with such silly side comments, and in such daring disrespect for the character of the court and witness, that it becomes positively intolerable.

See Ward-Smith case. 73 Mich., where practice is censured.

With the advance in practice, the power of amendments to process pleading, or proceedings, the right to feed the jury while they deliberate on their verdict; with better rooms and better

mannered counsel, where the clear cut business lawyer, like Choate, begins to out-run his bullying neighbor, in the race of court victories, may we not take a step in the reform of over cross-examinations? It surely seems so. Let us try the experiment.

It is the experience of the wisest lawyers that more cases—ten to one—are lost than are gained by cross-examination. That more time is spent by it than in hearing the direct evidence. That more wrangles follow these methods than from all other causes combined and yet they are repeated and oft repeated, at times extending to hours and half hours over details of book entries or brought in to exasperate some expert on some matter like "Haven't you boasted that you would like no better fun than to dance upon plaintiff's grave"; and then offer testimony to show that he had so boasted. What if he had, any more than to show his bias?

If the Circuit Judges of the state should set about checking this evil habit and securing more control of the drawling method of this branch of trial practice, they would take a long step forward in the line of progress. They would shorten the record by it. They would cheapen litigation, clear off the dockets and create a confidence that courts were made to advance business and not to furnish a theatre for cheap side actors to tickle the fancy of bystanders. Canadian judges are very prompt to discourage such by-play; English and French judges are extremely outspoken in such matters. It is time for Americans to fall in line. One half of our court time is consumed on immaterial matters. Our supreme courts are clogged by it. The people distrust courts because they are too loosely conducted and too many are insulted in their trials to accomodate unprincipled practices of unskilled or impudent attorneys. These are the men who delay business, clogg up our dockets, insult our witnesses, and impose a double duty on the supreme judges in forcing them to wade through hundreds of pages with no reasonable bearing on the issue. Any rules for remedy? Yes, three.

1. Ask counsel to be respectful; put them upon honor in court work.

2. Insist that the tedious stand up and stand in their places while examining.

3. Protect the witness from insult and check the long-winded from wrangling. Secure legislation, if necessary, to aid judges in the right to check counsel in civil cases.

The 40 judges of our state can save many thousands by reforming the evils of cross-examinations.

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NOTES.

The thanks of the Michigan Law Journal are due to Judge Victor H. Lane for his courtesy, as Secretary and Treasurer, of the Association of Judges, in furnishing copies of the addresses delivered on the occasion of its third annual meeting, as well as for his own complete report of the proceedings of the session. We publish these papers with the feeling that the addresses delivered and papers prepared by our judges are from a source which ought to furnish advanced ideas on the subject of law. The lawyers of the state will find in them subjects not only of interest but matters deserving of serious thought. Our space, unfortunately, will not permit of the publication of all of them this month, but others will follow.

In this number we present the full text of the report of the Committee of the Detroit Bar Association appointed to make recommendations of changes thought to be necessary in the Circuit and Supreme Court rules. The attention of the attorneys and bar associations of other circuits in this state is called to the proposed changes, and any suggestions or communications in reference thereto will be welcomed by the editors. This is a matter of importance to all alike and if the proposed changes will improve and simplify our practice, we should urge their adoption, and, if on the other hand, greater evils are likely to creep in, we would do well to go cautiously.

The United States Senate is, in the Venzuelan controversy, like the new arrival in a saloon: "Is this a free-for-all fight?" "Yes." "Well, then, deal me off a hand." The Senate desires to have the Monroe doctrine receive such recognition and publication as to inform all both at home and abroad what is intended by it. The senate committee on foreign relations has met and as we go to press will report back to the senate a resolution sufficiently broad to cover cases in which our wel-

fare as a nation shall cause us to interfere with the action of the governments of the old world so far as such action affects territory or territorial boundaries in the new. It was argued before the committee that the application of the doctrine, by various secretaries of state, has led to contradictory positions and to dangerous admissions. This is to be remedied.

At a recent meeting of the photographers of the state held in Detroit a subject of interest to lawyers came up for discussion: "Who owns the negative of a photograph?" It was finally decided that the association believed the photographer owned the negative, but that his ownership was limited to printing from it only on the order of the person for whom it was made. Their decision of the question is not final or authorative since they are neither lawyers nor judges, and are moved by self interest to take this position. The ownership depends, of course, on the original contract, but without doubt if the photographer has any ownership of the negative, it is a limited one. He undoubtedly charges on the first order for photographs a sum sufficient to reimburse himself for the expense of furnishing the negatives, but does that constitute a sale of the latter to a person ordering photographs?

Hon. Don. M. Dickinson in a speech recently delivered in Detroit strongly advocated the recognition by the United States of the Cubans as belligerents. He had previously delivered speeches on the same subject in New York and Washington, and while this later address was extemporaneous it contained many of the points of his former speeches. He thinks that for years the policy of England has been to acquire dominion over Cuba and that in the present crisis it is one of the possible results from present conditions.

We would be breaking no treaties in recognizing the revolutionists of Cuba as in fact belligerents. Spain so recognized the Southern Confederacy before actual military operations had begun, and in this case the standard of revolt has successfully withstood in Cuba the military force of Spain for nearly a year.

Such recognition would give them a standing before the nations of the world. They could purchase arms and munitions of war in our country and Spain would have to learn and acknowledge "It is worse than a revolt, it is a revolution." The simple recognition of the Cubans as belligerents would do much to making the revolution successful, but, whatever its effect, it is a deserved tribute to a body of revolutionists who are in fact belligerents. As Cleveland once said on another subject: "It is a condition and not a theory which confronts us." By all means let us do what we can in this matter.

LEGAL MISCELLANY.

A suit which has awakened great interest in Illinois was decided recently in the Circuit Court at Geneva. Some time ago the property of one John Furman, a farmer, was sold for taxes, the tax title being bought by one Henry Glas. The bid of Mr. Glas was for an infinitesimal part of the property—namely, a millionth of one-quarter inch line from the east end of one piece, and the millionth of one-sixty-fourth-inch line from another piece. Glas then put a cloud on the title by giving a trust deed for the entire farm. Furman sued to remove the cloud, and Judge Willis has decided the case in his favor. Furman has now sued Glas for damages.

The metropolitan police district of London embraces over 688 square miles. Of the enormous actual value of the property in charge of the police it is impossible to form any estimate. The population in 1894 exceeded 6,000,000, the proportion of crimes against property per 1,000 of the population was but 3.106. The cases of murder were but 13, which is considered below the average; and of these 7 were due to insanity.

The total number of criminal offenses of all kinds reported to the police was 20,970; a decrease of 497. The apprehensions numbered 14,902. The summary convictions showed an increase of 1,948, and were more numerous than ever before.

A recent decision by a Chicago judge will be of interest to both lawyers and clients as it upholds a very important precedent. A woman began suit against a street railway company for damages because of personal injuries. She employed an attorney to fight her case, and agreed that if she succeeded in getting a judgment in her favor he should receive 45 per cent. of the amount recovered. Should the case go against them, the attorney was to get nothing for his pains. The matter came to trial, and in the lower court a judgment for $1,700 rewarded the efforts of the attorney. The defending railway company appealed to a higher court, and the lawyer of the plaintiff asked to be made a party because he had an interest in the judgment. Before the case came to a hearing in the Appellate Court the railway company effected a compromise with the woman by paying her $1,000. This she pocketed entire and refused to give the lawyer his fee. The attorney then went into court and asked that the railway company be compelled to pay him 45 per cent. of of $1,700, the amount of the original judgment. The court decided in his favor, the railway company being ordered to pay him $765 and the costs of the proceedings.

On December 3rd, 1895, died, in New York City, William Fowler Foster, the senior member of the glove firm of Foster, Paul & Co. His will was filed in the office of the surrogate on January 16th, and disposes of an estate of $1,050,000 of which $1,000,000 is personal property. The estate is left in excellent shape—practically cash—and the provisions of the will disposing of this wealth are very clearly stated. There are 109 specific bequests of annuities to relatives and employes. The widow is given $10,000 cash and an annuity of the same amount. It is uncertain whether or not she will contest the will.

This estate represents business for two institutions. The will directs all of the annuities shall be purchased from the Mutual Life and the Equitable Life Insurance Companies.

A gas company is liable for damages in causing the destruction of shade trees by carelessly permitting gas to escape into the ground from its mains.

A gas company lawfully in the street is bound to use its right to conduct its operations so as not to inflict injury upon neighboring property.

In an action to recover damages for such an injury, it is competent for the plaintiff to show that after the construction of the defendant's gas line, other trees in the immediate vicinity to his property were similarly and simultaneously affected.

The rule of damages in such a case is the difference between the value of the land before and after injury. *Evans* v. *Gas Co. N. Y. Court of Appeals.* [Dec. 19.]

In the New York Court of Appeals on December 19th. was filed an interesting opinion on the duty of municipal corporations in respect to furnishing such an efficient supply of water as should afford protection against fire. It is held that such is not an obligation on the part of the corporation. The case is that of *Insurance Company, respondent,* v. *Village of Keeseville, appellant.* The action was brought to recover damages caused by fire which the plaintiff alleged were the result of defendant's negligence in failing to furnish an efficient water supply for fire purposes in the village. The syllabus of the opinion is as follows:

"A municipal corporation which voluntarily assumes the duty of providing for itself a water supply, under a general provision of its charter applicable to such municipalities throughout the state and permissive in its nature, does not thereby become liable for a loss by fire resulting from its failure to provide an efficient water supply."

"The municipality does not, by the construction and operation of

such a public work, under a provision of its charter general in its nature and scope, sustain such contractual relation to the public as to be responsible for a failure to exercise reasonable care and diligence in respect to its maintenance."

Judge Peckham before his appointment as Associate Justice of the United States Supreme Court while acting as judge of the Court of Appeals of New York wrote the opinion in a case novel in character and likely to prove hereafter a leading one. It involved the right of privacy, and is known as *Schuyler* v. *Curtis*, *42 N. E. Rep. 24*. An attempt had been made to erect a statue of Mrs. Mary E. Hamilton Schuyler, deceased, and an injunction had been sought by her nephew to restrain the procuring of subscriptions for such purpose as well as the erection and exhibition at the World's Fair at Chicago of the said statue. An injunction had issued and had been sustained by the Supreme Court. The opinion had said that the attempt was an "audacious one," and to permit it would be a "blot" upon our laws. This opinion the Court of Appeals sets aside.

The chief objection to the erection of the statue had been that it was proposed to have it represent Mrs. Schuyler as "The Typical Philanthropist" and to have another erected from the same fund and for the same purpose to Miss Anthony under the name, "The Representative Reformer." Plaintiff objected to the coupling of the two names and personalities and his objection was held good in the lower courts. The Court of Appeals, however, makes a different rule. It states:

"Whatever the rights of a relative may be, they are not, in such a case as this, rights which once belonged to the deceased, and which a relative can enforce in her behalf and in a mere representative capacity, as, for instance, an executor or administrator, in regard to the assets of a deceased. It is not a question of what right of privacy Mrs. Schuyler had in her lifetime. The plaintiff does not represent that right. Whatever right of privacy Mrs. Schuyler had died with her. Death deprives us of all rights, and in the legal sense of that term; and when Mrs. Schuyler died, her own individual right of privacy, whatever it may have been, expired at the same time. The right which survived (however extensive or limited) was a right pertaining to the living only. It is the right of privacy of the living which it is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings, and to prevent a violation of their own rights in the character or memory of the deceased. A woman like Mrs. Schuyler may very well, in her lifetime, have been most strongly averse to any public

notice, even if it were of a most flattering nature, regarding her own works or position. She may have been (and the evidence tends most strongly to show that she was) of so modest and retiring a nature that any publicity, during her life, would have been to her most extremely disagreeable and obnoxious. All these feelings died with her. It is wholly incredible that any individual could dwell with feelings of distress or anguish upon the thought that, after his death, those whose welfare he had toiled for in life would inaugurate a project to erect a statue in token of their appreciation of his efforts, and in honor of his memory."

A lawyers who has been prominent in the world of politics is nearing his end and to-day (Jan. 17) France fears the death of Ex-Premier Floquet. He was admitted to the bar in 1891, proved to be a lawyer of ability, and was employed in many of the cases affecting French politics. His training as a lawyer fitted him to be a statesman, and he rose to high positions. He was chiefly instrumental in formulaing the proposition for the expulsion of the royal families which had reigned in France, and this together with his duel with Gen. Boulanger in 1888 helped to make him widely known.

An injunction to prevent a city from shutting off a water supply from a consumer is sustained in *Wood* v. *Auburn* (*Me.*), *29 L. R. A. 376*, where the attempt was to coerce payment of an old claim, subsequent to which water had been furnished and paid for.

The Board of Regents of the University of Kansas is held to be such a corporation as is subject to the control of the court in *quo warranto* proceedings. *State, ex rel. Little* v. *Board of Regents* (*Kan.*), *29 L. R. A. 377*. The court in this case ousts the board from the exercise of the assumed power to compel the payment of a library fee by students in the University as a condition of using the library. With the case is a note on the nature of incorporated institutions belonging to the state.

BOOK REVIEWS.

COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES. Historical and Juridical with Observations upon the Ordinary Provisions of State Constitutions and a Comparison with the Constitutions of other Countries. By Roger Foster of the New York Bar, author of a treatise on Federal Practice, and Lecturer on Federal Jurisprudence at the Law School of Yale University. Boston: The Boston Book Company. Vol. I. 8vo. 713 pp.

This book gives in clear language a vast amount of information obtained and compiled from many sources. It tells how many of the phrases in our constitution originated and presents the carefully culled results of an immense amount of labor through many volumes of literature and old documents. It is well written and conscientiously enters into the arguments advanced on both sides of mooted questions. Chapter 1, the introduction, discusses "written constitutions" and gives a very brief sketch of events preceding the adoption of the Federal Constitution. It includes a discussion of the "Hostility to the Federal Constitution," "Anarchy preceding the Federal Convention," and sections on the originality of the work of the convention and the prototypes, models and compromises of the constitution. Chapter 2 enters into the nature of the constitution and of the preamble and contains a discussion of the relative merits of state rights as opposed to national unity. The sections of this chapter entitled "History of Secession" and "Reconstruction" are particularly good. The other eleven chapters and an appendix complete a volume of 713 pages. The last chapter is on "Impeachments" and gives a very complete history of the subject. We have carefully read the book, and have no criticisms to make either on its treatment of the subject or its typographical features. It is an excellent thing, and deserves much praise. The work is not concluded in the one volume, but it is hoped that there will be a full index with the last. It would not be complete without one.

DEMBITZ ON LAND TITLES—A treatise on Land Titles in the United States. By LEWIS N. DEMBITZ, of the Louisville Bar, author of a treatise on "Kentucky Jurisprudence." St. Paul: West Publishing Company. Two Vols. 8vo. 1065 pp. $12.00.

This work is in two large volumes. No apology can be expected, however, on account of the size of the work. The subject perfectly warrants it. A mass of matter has already been written upon it. It has been treated in conjunction with other subjects, and forms an important portion of many legal treatises. Mr. Dembitz has succeeded remarkably well in eliminating matter not positively essential to the thoroughness and the correct understanding of his work. For thus sticking closely to his technical subject he is entitled to a great deal of

credit. In this lies the practical value of his work. In the preface he calls attention to the obvious difficulties under which a writer upon this subject must labor, in order to make it strictly "up to date." He refers to the mass of rapidly accumulating statutes and the spasmodic and often unwarranted change in legislation on the subject. Reference is also made to the noticeable increase of "judge-made law" on the subject. As a criterion he cites our own state of Michigan, which, though ninth in rank among the states in point of population, publishes six volumes of law reports. This is stated without disparagement to the standard of the reports, for he acknowledges that thay are among the best.

Such examinations of the volumes as we have been able to make during the few days it has been on our table, has impressed us with the thoroughness of the author's work. The logical arrangement is a praiseworthy feature of the work. In the introduction the scope of the work is set forth and the development of the English land law in America interestingly told. The next chapter is upon description and boundary. The various kinds of estates are next considered. Then follow chapters upon title by descent, title by grant, title out of the sovereign and title by devise. The first volume concludes with a chapter on incumbrances. Volume II opens with a chapter upon title by marriage, followed by one upon powers. The registry laws are next considered. Estoppel and election are then treated of. Then comes two chapters of particular interest, one upon judgments affecting land, and another upon title by judicial process. The work concludes with a chapter upon title by prescription.

AMERICAN ELECTRICAL CASES. Vol. IV. A collection of All the Important Cases [except Patent Cases] Decided in the State and Federal Courts of the United States from 1873 on subjects relating to the Telegraph, the Telephone, Electric Light and Power, and all Other Practical Uses of Electricity, with Annotation. Edited by WILLIAM W. MERRILL, author of "Competency and Privilege of Witnesses," "City Negligence," etc. Vol. IV. 1892-1894. Albany: Mathew Bender. 911 pp. $6.00.

From time to time these volumes on Electrical cases have appeared and have been reviewed in this Journal. The new volume is number four of the series. The cases from this point begin to assume the appearance and the diction of today. They include those from 1892 to 1894 and the greatly varied uses of electricity as seen in operation today begin to appear. The older cases of the previous volumes were of use as precedents on which to base the principles of the law. This volume is of greater use in the application of the nicer rules of the law to the subject. The case law is already becoming systematized, and the view the editor and publisher first took that the series would be much consulted is beginning to be realized. The volumes are convenient to any one representing interests having to do with electricity or its uses. How greatly the practice has increased may be gathered in a measure from the review of volume one of this series which appeared in the

Michigan Law Journal, (Vol. 3, page 295.) Mention is there made of "Allen's Telegraph Cases," a book published in 1873 and containing all the cases which had arisen previous to that time. There were eighty-one reported. This volume containing only the important cases decided during a period of less than three years, includes the full report of 138 and notes referring to 136 additional ones. Attorneys for electrical interests will do well to possess these volumes.

Both the editor and publisher have done their duties well and a good book is the result. Specialties in the practice of the law are becoming frequent and necessary or these books would not be useful to the public or profitable to the publisher. Specialists in this line will need the books of this series.

RECENT MICHIGAN DECISIONS.

CONDEMNATION PROCEEDINGS — REGULARITY OF PROCEEDING UNDER SAGINAW CHARTER AS AMENDED—RIGHT OF APPEAL—CONFIRMATION OF ROLL BY COMMON COUNCIL—ACTION OF COMMITTEE BINDING ON COUNCIL.—1. The Proceedings had in the Recorder's Court to determine the necessity for the opening of a street and the compensation to those interested, is not open to collateral attack by parties who not necessary parties to that proceeding.

2. The provision requiring the counsel to fix the assessing district was stricken out of the Saginaw charter by the amendment of 1893, and as it now stands, the charter cannot be construed as giving the parties thereafter assessed for benefits the right to appeal from the finding of the jury in the Recorder's Court. Section 16 of the act must be construed as though the words "or assessed" were omitted.

3. An objection that the Common Council was an interested body because the members were taxpayers within the city has no force.

5. Title six of the chapter provides for the assessments to be made by the board of public works, after making the assessment the board is to report the same to the Common Council [Sec. 19 of Title 15] and the action of the council in affirming the roll is final and conclusive.

6. It appearing that the roll confirmed by the council was an entirely new roll, an objection that the council had confirmed the roll without reconsidering the former action of the council in setting aside assessment rolls on the same property has no force.

7. The charter leaves it to the council to fix an assessment district, and its judgment as to the lands benefited is final and conclusive.

8. The council referred the matter of confirming the roll to a committee before whom the parties interested were afforded an opportunity to be heard, the committee reported in favor of confirming the roll and the same was confirmed by the council.

Held: That the action of the committee was the action of the council and the parties having taken their appeal from the assessment to the council, and it being there heard, its decision is final and conclusive. *Brown* v. *City of Saginaw*. (Dec. 24.)

CORPORATION LAW—LIABILITY OF STOCKHOLDERS FOR LABOR DEBTS—LIABILITY OF OWNERS OF STOCK ACQUIRED SUBSEQUENT TO THE PERFORMANCE OF THE LABOR.—Howell's Statute, Section 4161, c, providing for the individual liability of stockholders of corporations organized under that act, or labor debts, cannot be extended to create a liability against one who purchases stock in a corporation after the debt is contracted. *Kamp* v. *Wintermute*. (Dec. 24.)

CRIMINAL LAW—EVIDENCE AS TO CONDUCT OF PARTIES AFTER COMMISSION OF A CRIME—ESCAPE FROM JAIL—EVIDENCE OF VOLUNTARY SURRENDER OF ESCAPED PRISONERS INADMISSIBLE—On the trial of one of three persons charged with the commission of a crime, the prosecution having shown that the same persons were seen together recently before the commission of the crime, evidence would be admissible tending to show the movements and conduct of each of the parties, when separated, on the day after it occurred.

It was not error to admit evidence as to the physical condition of one of the co-respondents after the affray, the testimony tending to show that he was not in the company of respondent the evening the crime was committed and could not therefore prejudice the respondent.

It was not error for the court to permit the prosecution to show the escape of the respondent and the other two from jail.

When the evidence clearly shows that the assault was in furtherance of the common design of the parties, one who was a party to the original unlawful design would be equally guilty whether he was present in the premises at the time of the assault or remained outside to watch and warn, so long as he was acting his designed part.

It was not error to refuse to allow the respondent to show that after his escape he voluntarily surrendered himself to the officers. Such evidence is not admissible for the purpose of removing the inference of the guilt raised by a showing by the prosecution of such escape. *People* v. *Cleveland.* (Dec. 10.)

CRIMINAL LAW—VIOLATION OF LOCAL OPTION LAW—JURISDICTION OF JUSTICE—INFORMATION—WITNESS—In a complaint for a violation of the local option law it is not necessary for the justice to reduce the examination to writing; where the warrant states that he held an examination, it will be presumed that he before him sufficient proof to confer jurisdiction

2. Where the oral charge gives in substance the law contained in the written requests, it is not error to fail to give them in their exact language.

3. Where the evidence is such as to warrant a finding that the respondents were not keeping a place of the sale of liquors such as the statute permits it is sufficient to cover the exceptions named in the statute.

4. Where all evidence of a transaction which a witness is relied upon to testify to, is stricken out by the court, it is not error to refuse to call such witness.

5. In this class of case testimony as to the condition of persons going in and out of the defendant's place of business is admissible. *People* v. *Berry.* (Dec. 3).

CRIMINAL LAW—PROSECUTION FOR RECKLESS USE OF FIRE ARMS—DUTY OF COURT TO DIRECT ACQUITTAL WHERE MALICE IS SHOWN.—In a prosecution under section 9111, Howell's statutes, for a reckless use of firearms, the testimony showing that a feud existed between the plaintiff's witness and accused; that the shooting was accompanied by threats and that the weapon was deliberately aimed and fired, it was error to refuse to direct an acquittal. *People* v. *McCully.* (Dec. 10).

CRIMINAL LAW—BASTARDY—CHARGE TO JURY.—In a prosecution for bastardy it is error for the court to instruct the jury that the fact that the brother of defendant attempted to settle the matter, was evidence that the defendant was the father of the child, although done upon his own responsibility and without the consent or even knowledge of the defendant. *People* v. *Hawks.* (Dec. 3).

CRIMINAL LAW—BURGLARLY—IDENTIFICATION OF STOLEN PROPERTY—SECTION 9134 HOW. STAT. CONSTRUED—PROOF OF GOOD CHARACTER.—Respondent was charged with larceny from a store, among the articles found in his house when searched, and identified by the owner of the store as his property, were certain bottles of essence. Upon the trial the prosecution offered in evidence two bottles of essence which were left in the store, the testimony tending to show that they were similar to those stolen, and also the articles identified by the owner.

Held: That the evidence was properly admitted.

Where living rooms over a store are accessible by stairways, the only means of getting from the rooms to the store being to pass out either upon the street or into the back yard and thence up the stairway, such stores are not adjoining to or occupied with a dwelling house within the meaning of Sec. 9134 Howell's Statutes.

Proof of good character is applicable in all cases where chime is charged and is not to be limited to cases where there is an even conflict whether the respondent is or is not guilty. *People* v. *Van Dam.* (Dec. 17.)

DEFECTIVE WALK—NOTICE TO AUTHORITIES OF DEFECTIVE CONDITION—EXAMINATION OF INJURIES IN OPEN COURT—IMPEACHMENT—DAMAGES—PREJUDICIAL REMARKS OF COUNSEL. 1. In an action to recover for injuries received by reason of a defective walk, evidence of the condition of the walk in the vicinity of the place of the accident is admissible as bearing upon the question of notice.

2. Evidence of a conversation with the street commissioner in which he was notified that the walk from the schoolhouse to the village in which was the portion of the sidewalk alleged to be defective, was admissible to show notice.

3. It rests within the discretion of the court to grant or refuse an application for the examination of the plaintiff's injury in open court, and where it appears that in order to make such examination anesthetics must be administered, it was not error to refuse such order.

4. Evidence of exclamations of pain made by the plaintiff during the pendency of the action were admissible, it appearing that they were uttered by a child of tender years, in his own home and not in the presence of medical attendants, and that they were natural and ordinary expressions of pain, called out by the suffering of the plaintiff and not by any motive of making testimony for himself.

5. As laying the foundation for asking an impeaching question, it is sufficient if the attention of the witness is called to the alleged contradictory statement, giving the time and place and the person to whom the words were claimed to have been spoken.

6. A question put to a physician which was in effect a request that he instruct the jury upon what theory their verdict should be based, was properly excluded.

7. It was not error for the court to instruct the jury to the effect that if they found for the plaintiff, and found further that his arm was permanently disabled by the injury, he was entitled to recover damages for his diminished capacity to earn after he attained the age of twenty-one, the declaration having alleged a permanent injury to the arm, and a permanent disability thereof and that the plaintiff was a minor.

The instructions of the court in relation to damages resulting from an aggravation of the injury by reason of plaintiff's neglect to care for the arm or follow the treatment prescribed, were not erroneous.

8. The question as to whether the plaintiff exercised such care in walking on the sidewalk and in avoiding injury as boys of his age and discretion usually exercise on like occasions, was properly left to the jury to determine.

9. The fact that some of the village authorities sent for and questioned certain girls who were witnesses of the accident, for the purpose of entertaining what they knew about the accident, was not sufficient to support a charge made by the counsel that the village authorities had entered into a conspiracy to defeat the rights of the plaintiff. *Strudgeon* v. *Village of Sand Beach.* [Dec. 24.]

EQUITABLE ESTOPPEL—WHAT CONSTITUTES—REPRESENTATIONS—WHEN WILLFUL.—Defendants who are merchants and doing business in Standish purchased the stock of one Hagley doing business at Omer, who was indebted to them. Shortly after such sale, plaintiffs, to whom Hagley was also indebted, called at Standish, and were informed by defendant Welles that Hagley was in a bad fix; that he had attached the goods of Hagley and that defendant's teams were over at Omer for the goods. Plaintiffs then went to Omer and persuaded Hagley to sign over to them his right of redemption in the stock. Subsequently their demand for the property being refused they brought this action, claiming that defendants, by their action, had estopped themselves from claiming title to the property in question under the sale from Hagley.

Held:—That as no statement made by defendant was of a nature to induce plaintiffs to go to Omer, and as they parted with no new consideration, and did not lose any rights after reaching there, the court properly held that there was no estoppel growing out of the statements attributed to defendant.

The rule on the subject of equitable estoppel is, that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous condition, the former is excluded from avering against the latter any different state of things as existing at the same time. *Miesel* v. *Welles.* (Dec. 17.)

EXPRESS COMPANIES—RIGHT TO FIX LIMIT FOR DELIVERY. Any express company may, so long as the public have notice of the custom, fix limits beyond which its agents are not required to go for delivery.

Where the company in apparent good faith has assumed to fix limits, having regard to public requirements, as to persons who have dealt with them, having knowledge of this fact, they are not bound to deliver beyond such limits. *Bullard* v. *American Express Company.* [Dec. 24.]

FRAUDULENT CONVEYANCES—ACTION ON CONTRACT TO CONVEY PROPERTY—PROPER PROCEEDING.—Plaintiff and defendant entered into a written agreement for the exchange of certain property. After the transfer was effected, plaintiff brought this action in assumpsit claiming the right to recover the difference between the actual value of the property sold and that received on the ground of fraud.

Held: That where a party sues in affirmance of a contract and asks damages for a breach of it, and the contract is found to be in writing, he is bound by its terms.

Where the assent of a party to a contract has been obtained by fraud, he may repudiate the contract, upon discovery of the fraud, or affirm it; his right to sue for the fraud will not be lost by affirming the contract. *Warnes* v. *Brubaker.* [Dec. 17.]

GARNISHMENT PROCEEDINGS—GARNISHEE DEFENDANT—WHEN ENTITLED TO COUNSEL FEES AND EXPENSES—SECTIONS 8098 AND 8073 CONSTRUED.—Sections 8098 and 8073,

Howell's statutes relative to the allowance of fees to a garnishee defendant, must be construed together.

Section 8073 applies to all contested cases, the costs referred to being those allowed to prevailing parties under the general statutes relating to costs and the amount to which they are entitled is limited by that statute.

Section 8098 applies where no issue is framed, and where the garnishee defendant is adjudged liable upon answer, or when he is discharged upon answer for any cause. *Wolcott* v. *Lenawee Circuit Judge.* (Dec. 10).

HUSBAND AND WIFE—LIABILITY OF HUSBAND FOR NECESSARIES FURNISHED INFANT CHILD—HOW LIMITED—EFFECT OF DECREE IN DIVORCE PROCEEDINGS—ALIMONY.—When a wife leaves her husband without justification and takes their infant child with her, she does not carry with her the credit of her husband for necessaries furnished for either herself or her child.

In an action against the husband to recover for necessaries furnished an infant child while the wife and child are living apart from the husband, it is incumbent upon the plaintiff to prove the implied contract upon which he relies, such contract being predicated upon the wrong of the husband and father.

The fact that in divorce proceedings instituted by a wife after separtion, on the ground of cruelty, the court dismissed the bill upon hearing, is conclusive between the parties that the husband was without fault and that the wife voluntarily and unjustifiedly abandoned her husband and his home (Grant, J.)

Where after alimony has been granted in divorce proceedings an aditional sum is allowed upon showing made of services rendered by a physician to the wife and child, it will be presumed that such additional allowance included the amount due for such services.—McGrath, C. J., and Montgomery, J., concur *Hyde* v. *Leisenring.* (Dec. 24.)

INSURANCE LAW—ADMISSIBILITY OF PROOFS OF DEATH—INTOXICATION AS THE CAUSE OF DEATH—WHEN QUESTION FOR THE JURY—CHARGE OF COURT.—The policy in question requiring proofs of death, they were produced by defendant's counsel and offered in evidence by plaintiff's counsel for the purpose of showing that plaintiff had complied with this condition of the policy. Plaintiff also showed by one Watkins that he had notified defendant of the death of the insured and received blank proofs of loss; that this was the paper he had received, filled out and forwarded to the company. The paper was also identified by a witness to its execution.

Held: That the proofs were admissible in evidence.

2. Reversal will not be had for improper remarks of counsel, where they are not of such a character as to prejudice the jury.

3. Defendant having rested its case the court permitted plaintiff to introduce evidence as to the habits of the insured before his death and in rebuttal of the defendant's testimony that he died from the effects of intoxication.

Held: Not error.

4. The testimony on behalf of the plaintiff tended to show that while the insured was addicted to the use of intoxicants, such use did not interfere with his attention to business or cause his death; while that of defendant tended to show excessive drinking, which, if true, vitiated the policy.

Held: That the question was one of fact for the jury. and not of law for the judge.

5. The insured having stated in his application for insurance that he was a moderate user of ardent spirits, malt liquors, and wines, inasmuch as such moderate use had any connection with his death, the defendant would be estopped by the terms of the policy.

The court having in his charge distinctly instructed the jury that if death resulted from the use of alcoholic liquors there could be no recovery, his instructions on this subject are not open to criticism. *Maier* v. *Massachusetts Benefit Association.* (Dec. 24.)

PARTNERSHIP LAW ESTABLISHMENT OF PARTNERSHIP RELATION—HOW SHOWN.—A contract was entered into between plaintiff and one Wheaton, which set forth that the plaintiff had appointed Wheaton its agent to contract for bridges and iron work, and to do any work in connection with the general business, when directed, in several states. Plaintiff agreeing to advance all money necessary to pay all general expenses incurred in the business, upon detailed statements of account rendered monthly. Wheaton agreed to devote his entire time to the business, in consideration of which plaintiff agreed to pay Wheaton one-half of the net profits, to be derived at by deducting the expenses from the contract price of jobs, the balance to be divided equally; losses, if any, the same way. The only obligation assumed was the giving of

his services, he put no money into the common enterprise.

Held: That the court was in error in finding that a partnership existed. [Montgomery, J., and McGrath, C. J., dissenting.]

Where the contract under which the business engagement is made contains the express or implied disavowal of an intention to assume the partnership relation, no partnership will be found to exist, unless such declaration is so at variance and so inconsistent with their engagement as to be irreconcilable. If the actual engagements are incompatible with the expression of intention, the latter must yield to the former, but where they can be reconciled, the latter must govern. *Canton Bridge Co.* v. *City of Eaton Rapids.* [Dec. 24.]

RAILROAD COMPANY—DUTY TO KEEP TRACK IN SAFE CONDITION—DOCTRINE OF SAFE PLACE—SECTION-MEN NOT FELLOW SERVANT TO TRAIN HAND—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE OF INJURY.—A railroad company is required to provide a reasonably safe track, one which measured by the standard of good railroading as actually conducted, can be said to be reasonably safe. If such standard would require the danger of ice freezing over the tract to be foreseen it was the duty of the company to foresee it. If good railroading requires provisions to be made to prevent such freezing to avoid accident, it would be negligence to omit such provision, and the same rule must furnish the test of the adequacy of the provisions made. These questions, unless the evidence is undisputed one way or the other, are questions of fact for the jury to pass upon.

2. It being impossible to show the actual knowledge of the intestate of the defect in the track, the question as to whether he had such knowledge must be drawn from the surroundings, and was a proper question for the jury to determine.

3. The accident having been caused by the tract being depressed and inadequate drainage, thereby causing water to stand on the track and freeze, the fact that the box drain under the track was frozen cannot be said to be the proximate cause of the injury.

4. It is the duty of the master to furnish a reasonably safe place for the employe to perform his duties, and this responsibility cannot be evaded, by confiding the duty of construction or repairs to competent servants.

While section-men are fellow servants of others engaged in making repairs, they are not fellow servants of those for whose use and benefit the repairs are made. Nor does the fact that the persons making repairs may be employed in fellow service, with the injured person in other work, relieve the master.

5. In the absence of any evidence which conclusively shows that it was negligent for a person to sit between two piles of logs upon a car when riding upon a siding, where he is expected to get off to make a coupling before reaching another car, the court will not take judicial notice of the fact that a person injured, while so riding, was guilty of contributory negligence. *Balhoff* v. *Michigan Central Railroad Company.* (Oct. 1).

RAILROAD COMPANY—DUTY OF COMPANY TO MAINTAIN TRACK IN SAFE CONDITION—SECTION FOREMAN AS FELLOW SERVANT—NEGLIGENCE OF COMPANY A QUESTION FOR THE JURY.—The duty to provide a reasonably safe place for the employe to perform his services rests upon the master, and this duty is one that cannot be shifted or evaded by any attempt to delegate it to one who happens to be, as regards some of his duties, a fellow servant of the employ whose safety is involved and to be provided for. (See Balhoff vs. R. R. Co. in this issue.)

This duty is also a continuing one to the extent that it is provided that the master shall provide reasonably for the inspection, and if need be, for the repair of premises or appliances.

The question as to whether the company employes used reasonable care in inspection was a question for the jury and should have been left to them under proper instructions as to what that negligence must be. *Anderson* v. *Michigan Central Railroad Company.* (Dec. 24).

CURRENT LITERATURE.

The *Review of Reviews* for January begins a new volume with the new year. The leading article is the usual one, "The Progress of the World." Its first paragraph is full of stroug thoughts on the situation of affairs in different parts of the world with a comment on the progress of the Russians and a suggestion that Japan, a power great in war, is destined to become even greater in its industrial relations to the countries of the world. It says: "Meanwhile the Japanese, with the largest cotton factories of the world, are carrying their capital and skill into China, where they propose to build still larger cotton factories, and will employ skilled Chinese labor at eight or ten cents a day. Some of these new Chinese factories will be in operation in the present year. Manchester, Fallriver and Lowell will have to take account of these new facts."

Following the paragraph introducing the new year is a discussion in the same department of the principal questions likely to be decided or agitated in the near future among the family of nations making up the world.

This leading article is always up to date and puts in clear language the main points of every important question.

"Current History in Caricature" and "Record of Current Events," both regular departments are always interesting and particularly so at this time when so much of history is making every day. The world is like a huge caldron and here is where one may see the bubbles rise and burst. We sometimes think that history has to do with the past and overlook the fact that it is building every day and the events of to-day make history for to-morrow. Here we see recorded events which when full grown are history.

"Abdul Hamid, Sultan of Turkey," by W. T. Stead; "At Jerusalem Five Years Hence," "Israel Among the Nations," "The Jews of New York," and the usual reviews of magazines makes up the January number.

The first issue of the *Atlantic Monthly* for 1896 opens with an unpublished Note Book of Nathaniel Hawthorne now printed for the first time. There are also the opening chapters of a new three-part story by F. J. Stimson (J. S. of Dale) entitled, "Pirate Gold." It deals with romantic Boston life in the fifties.

Two political articles will be sure to attract attention, "The Emancipation of the Post-Office," by John R. Procter, Chairman of the United States Civil Service Commission, and "Congress out of Date," the latter being an able statement of the evils due to the present system of convening Congress a year after its election.

Other features of the issue are: "The Country of the Pointed Firs," a short story by Sarah Orne Jewett; "The Johnson Club," being an entertaining description by George Birkbeck Hill of the meetings of Johnson enthusiasts at the Cheshire Cheese and other of Dr. Johnson's famous resorts; a sketch of provincial French life by Mrs. Catherwood, "A Farm in Maine," "Children of the Road," a study of child life among vagrants, by Josiah Flynt; and "The Schoolhouse as a Centre," by the editor of the magazine, a paper introducing the discussion of "The Status of the Teacher" in subsequent issues.

The *Green Bag* for January is a very interesting number to lawyers. Its contents are the usual departments, a sketch of the life of Rufus W. Peckham, the new Supreme Court Justice; an interesting article on the will of Chief Justice Marshall; and the fourth article on the Supreme Court of Maine. The portraits contained in the latter article are all good as is also that of Justice Peckham.

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THE RIGHTS OF THE PEOPLE IN CRIMINAL CASES.

JUDGE FRED H. ALDRICH.

There is nothing to which the American citizen points with greater pride than to the provisions in our laws for the protection of the liberties of our people.

The prosecution in any country, whether in the name of the ruler, the state, or the people, is clothed with boundless power, and endowed with unlimited resources, excepting only such limitation as surround the state itself, or are prescribed by the laws of the state for the protection of the individual against the combined power of all others.

Recognizing the fact that those clothed with authority are prone to use their power oppressively, during the centuries of the evolution of civilization jurists and legislators have discovered and enunciated principles for the protection of liberty, that are invoked whenever the individual in a free country finds himself confronted by the power of the state.

These provisions of the law are not for the protection of the guilty, but of the innocent. Were it possible for mankind to invent a perfect system of criminal procedure, then all the guilty would be punished, and all of the innocent would go free, but under any system which so far has been discovered, either many innocent must suffer or many who are guilty must go unwhipped of justice. In this state, and generally in this country, the humane principle is followed that it is better that ninety-nine guilty men should escape than that one who is innocent should be punished. This is a good rule, but the only thing that would justify allowing ninety-nine guilty men to escape is that the one innocent should not suffer.

Nothing can have a more demoralizing influence upon a community than to turn men free unpunished whom every one believes to be guilty of crime, thus acknowledging the incompetency of officials entrusted with the administration of justice, or the inadequacy of the law for the punishment and suppression of crime.

No principle is better established than that it is the certainty of the law that deters from crime.

It is useless to hope to even approach that perfection in the administration of criminal law wherein all the guilty shall be punished and all of the innocent go free, but we may hope by the improvement of our laws and criminal procedure and by the exercise of great care in the administration of justice, to secure both to the prosecution and the defense a trial upon the merits in criminal cases.

It is the people's right, whenever a charge is lodged against a person accusing him of a crime known to have been committed, and of which there is reasonable grounds to believe him guilty, to have such charge tried upon its merits. If this is not accomplished, it is because of defects in our laws or in their administration.

I would not advocate many radical changes in the laws. I would not take away any of the constitutional safeguards of the individual nor modify against the accused any of the statutes that have been enacted in the interest of liberty. I would advise first the selection of careful, prudent and able men as public prosecutors, and then on the part of the judiciary I would advise that substance and not mere matter of form be regarded as the all important matter. That while seeing that the constitutional rights of the accused are held sacred, everything should be done that could be, consistent therewith, to have the cause tried upon its merits, and that without needless retrials impoverishing the respondent, and wearying the people with our whole judicial system.

The courts of last resort in some of our sister states are accused of chasing after shadows in their attempt to discover errors upon which to grant new trials and they adopt the rule that every error is conclusively presumed to be prejudicial.

Our own court has held that it must be satisfied beyond a reasonable doubt that a respondent could not have been injured by an error in the judge's charge or the case will be reversed. (*Sullivan* v. *People, 31 Mich. 1*). But in a later case the court say exceptions by the defense in a criminal case can not be sustained where the action of the court was not clearly erroneous and did not injure the respondent. (*People* v. *Niles, 44 Mich. 606*).

In *People* v. *Murray 12 Mich. 10*, the court lay down a rule which, if followed in the future, will lead the Supreme Court to review not only the action of the trial court in its rulings, the prosecuting attorney in his remarks, as it has done in many cases, but the findings of juries as well, and the exercise of the discretion of the judge in pronouncing the judgment of the court thereon. In this case the court say: "If the Supreme Court in a criminal case sees upon a review of all of the proceedings which have resulted in respondent's conviction, that a fair trial has not been had, it is its duty under the general superintending power and control over inferior courts conferred by its appelate jurisdiction to set aside such proceedings, and order a new trial even though proper objections and exceptions have not been taken."

Now, if I may be allowed humbly to make the suggestion, it would seem to me that as a contrary to this the doctrine might be adopted that if the Supreme Court shall be satisfied that the respondent has had a fair and impartial trial notwithstanding some slight errors are made by the trial court, the case should be affirmed. I will say that in a number of the decisions of our court such a doctrine has been approached but it is far from being the established law of the state. The rule is established however in Michigan that in criminal as well as civil cases, error will not be presumed but must be affirmatively made out.

The legislatures of this and many other states have attempted to avoid some of the refinements of the courts in their application of the principles that govern the trial of criminal cases. By way of illustration, I will briefly mention several of the provisions of this nature in our laws with which the judges of the state are all familiar. Section 9534 of Howell provides that certain informalities shall not vitiate indictments and informations, Section 9535 that objections for formal defects shall be made before the jury is sworn and not afterwards, and further that if thought necessary the court may forthwith cause amendments to be made. Section 9537 provides for various amendments during the trial in case of variance where the variance is not material to the merits of the case. Section 9538 provides for other amendments made necessary by those made under Section 9537. Under Section 9423, if in the prosecution of an offense committed upon or in relation to, etc. real estate, or any offense committed in stealing, embezzling, etc. any money, goods or other personal estate, it be proved that, at the time of the alleged offense, either the actual or constructive possession, or the general or special

property, in the whole or any part of such real or personal estate, was in the person alleged to be the owner, the information will be deemed to be sufficient in that regard, and Section 9530 provides that upon a trial for misdemeanor or, if the facts amount in law to a felony, the respondent shall not for that reason be acquitted nor shall he ever thereafter be liable to be prosecuted for this felony upon the same facts unless the court shall discharge the jury without a verdict and direct such person to be tried for such felony.

These and other provisions of the statutes have gone a long way toward facilitating the trial of criminal cases upon the merits and have lessened the number of cases where the ends of justice may be frustrated by mere technical objections.

One thing further should be accomplished in this direction. When all of the proceedings are regular to judgment, the respondent should not be discharged on account of an error in the judgment or sentence but should be remanded to the trial court to receive his proper sentence. A statute has been enacted covering certain cases of this nature which I will mention further on, but leaving all others subject to the law as established by the construction which our court has given to the common law.

I see no good reason for holding that the court has lost its jurisdiction to make a valid sentence by reason of pronouncing one that is void, even though the void sentence has been partly executed. Our court has held that if no part of the void sentence was executed, a valid sentence could be pronounced after the void sentence was set aside. (*People* v. *Dane 81 Mich. 36.*)

I see no force in the objection usually urged that the court can not give a second judgment as, if what purports to be a judgment is a nullity then there is no judgment. When a sentence is deemed void on account of form or style a new sentence has been allowed to be pronounced both in this country and in England without especial statutory provisions to sanction it.* And in some of the states it is the practice where the sentence is erroneous (as imposing a punishment not authorized by law) to remit the cause to the lower court with directions to pronounce the proper judgment.†

Statutes are now in force in some of the states and in England which authorize a new sentence in the appellate court or a remis-

*Rex v. Kenworthy, 1. B. & C., 711, 8. 3. C. L. 300. Rex v. Holloway, 5 Eng., L. & Eq. 310. Baker v. State, 3 Ark. 491. Benedict v. State 12 Wis. 313.

†Peylow v. State 12 Wis. 534. Beal v. Commonwealth 25 Pen. St. 11. Lacy v. State 15 Wis 13. Harington v. State, 87 Ala. 1. People v. Riley, 48 Cal. 549. State v. Shaw, 23 Ia. 316.

sion of the cause to the lower court for sentence in cases where an erroneous judgment has been entered upon a lawful verdict. In the early cases in this state the court held that a sentence was void in the entirety if for a longer time than that provided by statute. But Act No. 170 of the laws of 1867, Section 9614 of Howell provided that such a sentence should be void only as to the excess. In *Wilson* v. *People* it was held that a sentence to imprisonment in the state's prison for an offense only punishable in the county jail did not come under the provisions of this statute, as no part of the sentence imposed was sanctioned by law. It was therefore not excessive, but entirely void. It was further held that no new trial could be had or other sentence imposed, following the earlier cases above mentioned, where void sentences are considered. These cases stand upon the theory that the sentence being void the appellate court has no power to make a judgment for the lower court, and the lower court having once passed judgment cannot rejudge the case, and no new trial can be had as the respondent has been once in jeopardy.

This will, undoubtedly, remain the law in this state until it is changed by statute, as it is too well established by the decisions for us to expect the court to adopt a contrary rule. However, the Supreme Court very nearly disregarded its former decisions on this subject in *People* v. *Murray* above cited wherein it set a judgment aside and ordered a new trial on the ground of its general superintending power over inferior courts, where no error was discovered except the passing of an excessive sentence where the law provides a sentence for any number of years or for life, and the sentence was for a period of years which in all probability would amount to life.

Notwithstanding the many efforts to do away with technical objections the substance of all the safeguards to liberty are very properly left inviolate. An information alleging no offense can not be so amended as to allege one which is cognizable. Nor in case of variance can an amendment be allowed which shall set up a new offense. In pleading a statute it must be strictly followed.

It is still necessary for the prosecuting attorney to have some knowledge of the laws of his state and the facts that he expects to prove in the case for trial and at least enough skill to accurately copy the words of the statute that will apply to the case and to set up the offense which he intends to prove with a reasonable degree of particularity.

Only some of the excrescences that have grown out from the true principles that stand for liberty have been cut away allowing

that which is substantial and necessary to remain. There is still much more to be done in this regard, both by our courts and through legislation, to the end that the accused in all cases shall have a fair hearing, but shall not be allowed to defeat the ends of justice by the interposition of those safeguards that are intended only to secure justice.

Primarily the purpose of that ancient and excellent provision of the law that no man should be twice placed in jeopardy for the same offense was that a man should be tried but once upon a given charge, but its effect may be, and often is, to prevent one being tried and abiding the judgment of the court at all when charged with an offense.

Under this doctrine as anciently held and laid down in the earliest case where it was discussed by our Supreme Court and followed in the later cases, after a competent jury has been accepted by a respondent, impaneled, and sworn, the information being legally sufficient to restrain a conviction, the discharge of such a jury without sufficient cause operates as an acquittal and bars another trial for the same offense. Cases have frequently occurred where the trial was not actually entered upon at all to the extent of taking any testimony yet where enough was done to bar a future prosecution. I have no remedy to offer in such cases except greater care on the part of the prosecuting officers in the preparation of informations and the court in ruling upon questions that are raised during the trial. When amendments are allowable and necessary they should always be ordered, even if the prosecuting attorney fails to ask for them, and the court should never direct a verdict of acquittal upon technical objections being made, unless where a verdict must necessarily follow, as in case of fatal variance, and the record should be made to show just what action has been taken. If such proceedings do not amount to an acquittal, then another trial can be had. If a jury is discharged on respondent's motion there is no bar to a second trial even if the information is sufficient in law to support a conviction. (*People* v. *Gardner, 62 Mich. 303*; *People* v. *Price, 74 Mich. 307.*)

Our constitution has enlarged the common law doctrine, and Sec. 29, Art. 6, declares that no person after an acquittal upon the merits, shall be tried for the same offense. As if fearful that this provision of the constitution would not be understood in its broadest sense, our law-makers provided in sec 3, in chapter 151 of the revised statutes of 1846 (How. sec. 9070) that no person shall be held

to answer on a second indictment for any offense of which he has been acquitted by the jury upon the facts and merits in the former trial, but such an acquittal may be pleaded or given in evidence by him in bar of any subsequent prosecution for the same offense, notwithstanding any defect in the form or the substance of the indictment on which he was acquitted. This provision of the statute and that of similar import in the constitution, might be construed as narrowing the provision of the common law, making it applicable only to cases that are heard upon the merits. But they have been construed by our Supreme Court, as enlarging and in no sense limiting the common law rule. (*People* v. *Harding 53 Mich. 484.*) If the first indictment is good under the common law it is not necessary that there should have been any hearing upon the facts. If there has been a hearing upon the merits and an acquittal it is not material how defective the first indictment may have been. It therefore follows that if the respondent knows the indictment to be void he can safely proceed to trial upon it, for if there is an acquittal it will be a bar to subsequent proceedings, and if a conviction it will be set aside even if no question is raised in the Circuit Court as to the validity of the information. (*People* v. *McKinney, 10 Mich. 53; Wattles* v. *People, 13 Mich. 443.*)

In every closely contested trial there will be many important questions raised, upon which eminent counsel will differ. Some of these questions may be so close to the line that the court will hesitate in his decision and be in doubt as to the right of the matter.

Lawyers and judges disagree as to the duty of the court in such cases. One says, in law questions as in facts, the respondent should have the benefit of every reasonable doubt. Another says The prisoner has the right of appeal while the people have not, therefore, all close questions of law should be decided in favor of the prosecution.

Suppose there are ten such questions in a case upon which good lawyers will stand about equally divided, if the latter rule is followed then the case will only stand one chance in ten of being affirmed for usually, if any error is found, it is deemed prejudicial and the case is reversed.

It is seldom that the trial judge has not a well formed opinion upon a question presented to him, after a careful investigation of the matter. In such case of course there is but one way for him to decide. His duty is so plain that the question itself suggests the answer, but when a question arises upon which the court really is in

doubt, I should say if it is one of the minor questions in the case give the respondent the benefit of the doubt. That, I believe, in the long run would be to the advantage of both the people and the respondent.

If the whole controversy centered upon a single question and the court was in doubt as to whether or not the case should proceed to trial upon its merits, I should say solve the doubt by letting the case go to the jury upon its merits, unless the question was raised at a time when, and in a manner in which, the alleged defects could be cured by amendments or by a dismissal, commencing the case anew. In such cases I would rule on the side of certainty.

There are times when the judge is convinced in his own mind at the close of the case that there has been a complete failure of proof upon a material element of the offense or a fatal variance, but learned and experienced counsel differ from him. He can not but respect the opinion of such counsel. He may desire in deference to such opinion to have the matter in question passed upon by the Supreme Court but he can not satisfy himself, for that purpose, by deciding contrary to his convictions and the rights of the respondent as he views them.

What should he do in such a case?

I could only suggest one solution and that would not always be available. He could require the counsel for respondent to put his motion to take from the jury in the form of a request and have the prosecuting attorney prepare his requests. He could then mark the requests allowed or refused according to his judgment in the matter, and, if the Supreme Court was in session, adjourn the case for a time allowing the jurors to go, under proper instructions as to their conduct, to the end of such time, and give the prosecuting attorney an opportunity to apply to the Supreme Court for a mandamus requiring the circuit judge to proceed to charge the jury as to the law, allowing it to exercise its function in the decision of the facts. To avoid any delay by reason of the making of an order to show cause, by agreement, the circuit judge could show cause why a mandamus should not issue at the same time that the application for the mandamus is made. I am not aware that such a course has ever been followed. I am sure that it has not in this state, and the time which I have had for the preparation of this paper has not been sufficient to allow an extended research among the decisions of other courts. I know that it would not be expedient in many cases and would be impossible in others, but there are times when it could be done, and I

believe that often all parties would feel very much relieved by having the chance open for a hearing in the Supreme Court when it could not be had in any other way.

I think there could be no doubt as to the legality of such a procedure. The Supreme Court will interfere to reinstate an information (*People* v. *Swift*, *59 Mich. 529*) or to compel a judge to hear a case that he believes has been barred by prior proceedings. And it is a very common thing for courts to adjourn for several days and even for more than a week at times, and no question is ever suggested as to the legality of such adjournment even though a trial is in progress.

THE JURY SYSTEM—OBJECTIONS TO IT.

A. T. BREWER.

In the following discussion, it will be assumed that readers of this magazine perfectly understand what the jury system is:

FIRST—IT IS TOO UNCERTAIN.

History has shown that there is nothing in human experience so uncertain as the verdict of a jury.

Both history and experience have taught that there is nothing so desirable in a tribunal as certainty.

The uncertainty of jury trials is the worst of all uncertainties, because it is liable to be illogical and absurd as well as uncertain.

For instance, in Pennsylvania, recently, a common laborer was killed through negligence. The jury returned a verdict for $250.00. In another case, where the person injured was also a common laborer, and lost a foot, the same jury returned a verdict for $10,000. In another case, a coroner's jury returned a verdict that the deceased, who was found in the water, came to his death by a blow on the head inflicted either before or after he was drowned.

The uncertainty appears at every stage and phase of the trial. First, whether there will be any verdict at all. Second, whether for plaintiff or defendant. Third, what measure of damage shall be awarded; and here, in tort or contract, the verdicts are as mysterious and eccentric as the orbits of wandering comets. Often the more certain and careful the preparation, the more uncertain and erratic the verdict. When litigants are before juries, they are liable to lose all benefit of the most careful, intelligent and prudent business methods; and frequently, the very fact that great care has been taken by one party in fixing amounts and dates and circumstances, is turned against him by observation of counsel that he was preparing for a law suit.

It is a well-known fact that clear rights are surrendered and unquestionable wrongs submitted to every day, because of the dread of going before juries, where a palpable injustice may be magnified into a gross outrage.

This feature of uncertainty is inherent and incurable. It has al-

ways existed, and actually grows worse, as commercial and other business grows more complicated and diverse. In other words, the jury system is growing more and more inefficient, and is entirely too lame and impotent to deal successfully with ordinary controversies arising out of the industrial and financial affairs of men.

SECOND—IT IS TOO SLOW.

It is safe to say, ordinarily, that a case can be tried by a judge alone in one-fourth of the time that it requires to try the same case by a jury. The arguments are fewer, briefer, and more to the point. The testimony is more likely to be confined to the real points in issue. There are no discussions, by counsel, for the mere purpose of making sentiment. The brow-beating of witnesses, the harsh criticisms of parties, is not indulged in before the court, for the simple reason that they would have no effect. A great many questions that would be argued to the jury are never mentioned to the court. In other words, it is assumed that the court knows the law, and is as capable as counsel of weighing evidence.

After the case is submitted to the jury, their deliberations occupy a great deal of time.

In most countries, business of court and counsel is practically suspended while the jury is out. Then follow the usual motions, to set aside the verdict; for a judgment notwithstanding the verdict, and so forth.

THIRD—IT IS TOO EXPENSIVE.

Careful investigation has established the fact that jury trials cost more than the amounts involved. That is, take the aggregate amount of verdicts rendered in a year and compare that with the aggregate cost to the parties, to the state and the county, and it will be found that it would be cheaper for the people to tax themselves and raise a fund and pay every just claim asserted, than to have the cases tried and determined by courts and juries. A good share of the expense grows out of repeated trials where disagreements have occurred, or where the verdict for some reason has been set aside. Some of the expense consists in taking care of the jury. Having rooms and space occupied exclusively by jurymen.

The expense of summoning the jury is also very great, to say nothing of the record and clerical work incident to the jury system. None of the expense of jury trials is directly beneficial to either party, but is a useless burden on tax-payers, impeding instead of advancing the real interests of justice.

FOURTH—IT IS BURDENSOME.

If good jurors are secured, they are found among intelligent, capable, busy men, who are subjected to great inconvenience by being taken, forcibly, away from their affairs and kept for an indefinite time. This great detriment has resulted in courts and officers using, to a great extent, inferior men for jurors. The man who has failed in all lines of business, and has nothing to do, is the man who frequently serves on the jury; having been unable to deal successfully with his own affairs, he is yet asked to handle and determine the most difficult interests of other men; having no employment himself, he is not only indifferent to the lapse of time, but the longer the case lasts the better it suits him and the more he gets out of it.

Even in civil cases the jury is rarely up to the average intelligence of the people; and in criminal cases, the law and practice peremptorily demand that the jurors be men with no opinions, no information or knowledge on which to form opinions in regard to the controversy,— which is equivalent to saying, the jury must be too stupid to read and too ignorant and indifferent to form opinions when they do read.

FIFTH—IT IS NOT WANTED BY THE PEOPLE.

It is frequently remarked by judges, attorneys, and others, that any one having a good case, perfers to submit it to a court, and it is only those having questionable claims who demand juries.

The American people submit to the jury system, because they see no way of getting rid of it. They bear it as a necessary evil. A burden which they have inherited and which has the sanctity of immemorial usage.

Aside from criminal cases and personal injury cases, the jury system is regarded, generally, with disfavor by intelligent men and women. The lawyers who make a business of "fixing" juries and securing unjust verdicts, are becoming more and more loathesome to decent people. This has recently been shown in a great many ways—as, for instance, the great riot in Cincinnati, resulting in the destruction of the court house and the best library in the State of Ohio.

SIXTH—IT IS INCONSISTENT WITH AMERICAN INSTITUTIONS.

Every one knows that the jury system grew up, mainly, in England, at a time when the judges were appointed by, and were amenable to the Crown. The people demanded juries then, because

they wanted some representation on legal tribunals; hence the jury was called the palladium of liberty.

In the United States there is no need of this palladium. The people elect or appoint their own judges and the judges are answerable to the people. So, the judge on the bench is one of the people; having sympathies, sentiments and opinions in common with the people.

The jury system is particularly hostile to republican institutions, because it requires an unanimous verdict. Whereas every other question is decided by majority, and some more important determinations are reached, by two-thirds or three-fourths; the jury composed of untrained men, inexperienced in the work of determining issues and weighing evidence, are yet required to be unanimous.

Mr. Justice Miller, of the United States Supreme Court, one of the ablest and most learned of American jurists, said that this feature of the jury system is a "gross absurdity."

SEVENTH—IT IS NOT NECESSARY.

There is no need of a jury system, or anything analogous to it, in the United States. There is no oppression to be resisted; no tyranny to be apprehended; no difficulty at all in providing efficient and satisfactory tribunals, to determine legal controversies.

A large proportion of cases are called equity or chancery suits; wherein the parties are not entitled to trial by jury and never have been entitled to such trial in the United States. Yet, there has never been any complaint of injustice, or oppression, in that branch of the law.

Nearly all suits of admirality or maritime nature are tried by courts and no general demand has ever been made for any other kind of tribunal.

It is a very simple matter to arrange for speedy, inexpensive and intelligent determination of legal controversies. The issues may be tried by one judge, and may go thence, if unsatisfactory, say to three, and finally, if of sufficient importance, to the court of last resort, composed of five or more judges. By adopting such means, most controversies could be determined in a few weeks from the time of beginning suit, with better satisfaction to all concerned.

EIGHTH—CONSTITUTIONAL BARRIERS NOT INSURMOUNTABLE.

In criminal cases, it would be difficult, if not impossible, to abolish, or materially change the jury system, without amending the constitution of the United States and of the several states. But, in civil actions it is

easy to adopt measures which will, substantially, do away with jury trials. This has been done in many states of the Union.

The legislation, in such cases, is based on the theory, that while the constitution gives the right to trial by jury, it does not require the state, or the county, to bear the expense of the trial. It has, therefore, been provided that the party demanding the jury shall give notice thereof and pay into court, the probable costs in money, or give adequate security.

This provision prevents a large majority of jury cases, and protects the county from costs in the other cases, and has been eminently satisfactory. Such a statute is now in force in Ohio, applicable to cases appealed from Justices of the Peace. [91 O. L., 793.] Other statutory provisions could be lawfully made, which would still further reduce the number of jury trials.

NINTH—IT IS DEMORALIZING.

The ingenuity of man has been inadequate to devise any means of securing jurors free from political bias. Usually the party in power, through some of its officers, selects the jurors; say, the County Auditor, the Clerk and the Recorder. These officials are under obligations to their friends, throughout the county, for support and will, naturally, favor such friends in preference to men of the other political party. No number of oaths will change this natural disposition. The jurors, therefore, in a Republican county, are sure to be nearly all Republicans; in a Democratic county, nearly all Democrats. The jurors are, in turn, under obligations to the officers who selected them; there being a mutual dependence, which is often influencial and even decisive in controlling verdicts. The jury system in America is, therefore, a part of the political machine and as open to corruption as any other part.

It is also well known to every one of experience, that thousands of cases are brought now that would never be bought if there were no jury system. Claims utterly devoid of merit are asserted, because it is the experience of every trier of jury issues, that many good cases cannot possibly be won and many bad cases cannot possibly be defeated. The jury system, therefore, is responsible for a large portion of law suits and for a great deal of ill will, or bad feeling, of perjury and contention in the community.

In cities there are large numbers of professional jurors. Men who do do nothing but sit on the jury. Who, if it were not for the jury system, might be following some honest and useful occupation.

It is demoralizing on the judges. It takes away the responsibility to a great degree; and judges are frequently found, so weak, and with so

much fear of incurring displeasure, that they will set aside no verdicts, where such action will displease the jury.

In many cases, while a judge may set aside a wrong verdict, he has no power to direct a just one.

There is one class of people to whom the jury system is entirely satisfactory, namely the boodlers. In this system they find hope, comfort, mercy.—*Western Reserve Law Journal.*

IS IT CONSTITUTIONAL? THE OTHER SIDE.

ROBERT T. SPEED.

A number of attacks have recently been made upon the constitutionality of the act allowing judges of one judicial circuit to sit in any other circuit. This is act No. 152 Public Acts of 1895. Section 1 of the act provides "That whenever the business of any of the circuit courts of this State has accumulated beyond the capacity of the judge or judges to properly dispose of, it shall be the duty of the Governor of the State upon such showing of facts, and request made by the presiding judge of such court, to designate a judge or judges of some other circuit or circuits in this State whose official duties will permit for the time being to hold court temporarily for such time or term as he may deem advisable, and the judge or judges so designated shall perform the duties, and hold court for such time or term in like manner, and with like effect as they severally and respectively could have done if they had been elected to such office in the circuit where such duties of judge are performed."

The following reasons are assigned against the constitutionality of the act.

1st. Because it deprives the electors of their right to choose their own judges.

2nd. Because, inasmuch as the constitution says that judges shall be elected in counties and by the electors thereof, the legislature has no authority to allow judges to try cases in any other county, other than their own.

3rd. Because the act creates great confusion and delay.

4th. Because the legislature has no authority to allow circuit judges any compensation beyond that fixed in the constitution.

These objections will be considered in their order.

It is thought that the right to choose circuit judges is a right of local self government.

When the constitution provides for an elective office in cities or counties, or the legislature creates such an office, the electors thereof have an undoubted right to fill the same. *Attorney General* v. *Trombley, 89 Mich. 50.*

And this right cannot be taken away. The manifest intent of

the constitution is that the judiciary shall be elected. *People* v. *Burch*, *84 Mich. 415.*

The right to elect circuit judges, however, cannot be considered as a right of local self government. The only reason for electing them in counties was because it became necessary to have some geographical division in which their election might take place, and because it was deemed advisable to bring justice home to the people.

"The salaries of all the judges are payable out of the state treasury, and the only object in having local courts is to bring justice home to the people, but not to have cases decided as the desire of the people might shape the decisions." *People* v. *Goodwin*, *22 Mich. 499.*

The circuit courts are not local courts. "The circuit courts have general common law jurisdiction, and has always been a state court, held by judges paid by the state and is in no sense a local court. Its judges may interchangably perform the duties of the office in any part of the state." *Whallon* v. *Ingham Circuit Judge*, *51 Mich. 511.*

It is true that circuit courts cannot exercise jurisdiction in respect of persons and property beyond the limits of their county. *Turrill* v. *Walker 4 Mich. 180.*

But this only respects original process. The reason is obvious. If the judge of one circuit could send compulsory process into any other circuit so as to draw to him a jurisdiction over persons or things without the limits of his circuit, there would be a clashing of jurisdiction between the courts which could not be easily adjusted. But so far as is practicable the jusisdiction of the circuit courts is made co-extensive with that of the state. The constitution gives jurisdiction to the circuit courts over transitory actions upon contract as well as in tort; and this jurisdiction cannot be taken away by limiting the forum of action to the county in which the plaintiff resides. *Atkins* v. *Borstler, et al., 46 Mich. 552.*

Thus it will be seen that the jurisdiction of circuit courts has been limited only when it was absolutely necessary to prevent a clashing of judicial process. It will be found upon an examination of the decisions in this state that the jurisdiction of circuit courts has been limited only to that extent that perfect harmony may exist between the several circuits. The state has been divided into circuits and a circuit court is to be held in each circuit. *Constitution Article 6, Section 6.*

This is done that justice might be brought home to the people,

that evil doers might be readily punished, and that suitors might not be hampered by vexatious suits commenced in some remote county. There is not the slightest intimation in the constitution or laws of this state or of the decisions of the supreme court, that the circuit courts are local courts.

It was wisely said in *Whallon* v. *Ingham Circuit Judge, 51 Mich. 511*, that "circuit courts are state courts, and are in no sense local courts." Services in the administration of justice are in no sense local services. The people of the entire state are concerned in the proper administration of justice, and for that reason all judicial officers are state officers.

The right to elect municipal judges is not a right of local self government. They perform duties in which the people of the entire state are concerned. It is only in relation to officers performing local administrative functions that the right of local self government may be exercised.

I think the first contention against the validity of the act is not sound.

The contention that circuit judges cannot sit in any county unless elected in such county is equally unsound. The act under consideration provides "That whenever the business of any of the circuit courts of this state has accumulated beyond the capacity of the judge or judges to properly dispose of, it shall be the duty of the Governor", etc. An act to accomplish the same purpose, viz. that of expediting the business of circuit courts, and compelling the judge of one circuit to sit in another, was held constitutional. This was act No. 208, laws 1893, the first section of which is as follows: "That in all cases in which the judge of the thirty-first judicial circuit may be interested as a party, or as a member of the corporation which is a party to a suit, or has been heretofore consulted or employed as counsel in the subject matter of any litigation in said suit, or in which he would be excluded from sitting as a juror by reason of consanguinity or affinity, or when the business of such judicial circuit shall be such as to require additional assistance in order to expedite the business thereof, it shall be the duty of the judge of the sixteenth judicial circuit to hold the term or terms of court for the trial of such causes as the judge of said thirty-first judicial circuit may be unable to try. The second section of the act provides that the judge of the thirty-first judicial circuit shall sit in the sixteenth judicial circuit under the same conditions as requires the judge of the sixteenth to sit in the thirty-first circuit. The act was held constitutional in *Toll*

v. *Jerome, 101 Mich. 472.*

Judge Montgomery, speaking for the court, say: "We think the law is not in conflict with any constitutional provisions, and should be held valid." We see the similarity of the language used in the act of 1893 and that of 1895. The act of 1893 says "or when the business of such judicial circuit shall be such as to require additional assistance in order to expedite the business thereof" etc. The act of 1895 says "that whenever the business of any of the circuit courts of this State has accumulated beyond the capacity of the judge or judges to properly dispose of" etc. Both are intended to accomplish the same purpose, viz. that of expediting the business of courts.

If the act of 1893 is within the constitutional powers of the legislature, as it was, *Toll* v. *Jerome, 101 Mich. 472*, it would seem that the act of 1895 was equally so.

The constitutional prohibition, if one exist, would operate with as much force in the one case as in the other. The supreme court, however, found that no restraint upon the legislature existed to pass such an act. If the legislature may provide that the judge of the sixteenth circuit shall sit in the thirty-first circuit in certain cases, may it not provide that the judge of the Saginaw circuit shall sit in the Wayne circuit? The legislature has ample power if there be no constitutional restraint. "Does the constitution take from the legislature the right to empower a circuit judge under any circumstances and for a temporary and specific purpose to hold court in the circuit of another judge? It is believed that the same rigid rule of criticism which would construe this part of the constitution into such a prohibition would deny to the legislature the right to authorize the circuit judges to exercise any jurisdiction out of the counties in which they are held." The decision in *Toll* v. *Jerome* is decisive of this question.

Section II, Article 6 of the Constitution, gives the legislature power to pass this act. It says "judges may hold court for each other, and shall do so when required by law." The words "and shall do so when required by law" were intended to give the legislature the power to provide for just such emergencies as are named in the acts of 1893 and 1895.

The constitutional convention foresaw that the business of some of the circuits might increase "beyond the capacity of the resident judge to properly dispose of." The business of some of the circuits may be very extensive for a single term and instead of requiring the people to pay the salary of an additional jddge, it was deemed better to allow an outside judge to come in temporarily and assist in dis-

posing of the business. Under the provisions of Section II, Article 6, the legislature may impose duties upon certain circuit judges which are not imposed upon all.

One of the objections to the constitutionality of the act of 1893, was that it imposed duties upon certain circuit judges which were not imposed upon all. But the objection was overruled, Judge Montgomery citing the constitutional provision that "judges may be required by law to hold courts for each other."

It is said that the act is impracticable and creates very much trouble, confusion and delay. But the act is not unconstitutional on these grounds.

Considerations of mere expediency or policy cannot enter into the question of a statute's constitutionality. *Tyler* v. *People, 8 Mich. 320.*

The wisdom or policy of a statute is not a question for the courts so long as it is valid. *Reithmiller* v. *People, 44 Mich. 280.*

The legislature, when acting within the sphere of its powers in making laws, passes finally upon all questions of policy or equity. *Sheley* v. *Detroit, 45 Mich. 431.*

"The legislature, when acting within the sphere of its powers in making laws, passes finally upon all questions of policy or equity." *Sheley* v. *Detroit, 45 Mich. 431.*

"Considerations of mere expediency can never legitimately enter into the discussion of questions involving the constitutionality of a law." *Green* v. *Graves, 1 Douglas 352.*

"The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but the courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason and expediency with the law-making body." *Cooley, Constitution Limitations, page 204.*

We now come to the fourth objection. It is claimed that the extra ten dollars for expenses allowed the judges under the Act of 1895 is in excess of the constitution and void.

Article 9, Section I. of the Constitution provides "the judges of the circuit court shall each receive an annual salary of two thousand and five hundred dollars; and that they shall receive no fees or perquisites whatever for the performance of any duty connected with their office. It shall not be competent for the legislature to increase the salaries herein provided. It is contended that to pay the judges expenses in

traveling etc. is surely adding to their income and is a perquisite they receive as such judges over and above the salary allowed by the constitution. It would not be possible to give a more narrow construction to the act. Section 4 of the act provides "All the necessary expenses of said circuit judges, or either of them so designated in going from their respective places of residence for the purpose of so holding court, and in returning thereto, and all their other necessary expenses for that purpose, not exceeding the sum of ten dollars for each day that either of such judges shall so hold court, shall, at the end of the time or term for which said judges shall respectively be so designated, when duly certified by them, be allowed by said circuit court, and shall thereupon be audited and allowed by the board of county auditors or the board of supervisors, as the case may be, for the county, and shall be paid out of the county treasury of the county where such court is held. This section is intended to cover "necessary expenses" in traveling to and from their homes. Not one word is said about salary. The 1st and 2nd sections of the act would be void if the 3rd section could not stand. The legislature could not require the judges to travel from county to county without paying their "necessary expenses."

The Attorney General is required to appear in any court in the state when requested to do so by the governor or either branch of the legislature; and yet the state does not require him to pay his traveling expenses out of his own salary.

The constitution, Section 1, Article 9, provides that the Attorney General shall receive an annual salary of eight hundred dollars. The salary of the circuit judges and that of the Attorney General are fixed by the same section of the constitution. Section 293 of Howell's Statutes provides "the Attorney General shall receive an annual salary of seven hundred dollars, payable quarterly. and his actual necessary expenses." Now, if the legislature cannot pay his traveling expenses, then section 293 Howell's Statutes is void. But it has remained upon the statute books for many years, and its validity has never been questioned.

In *Kirkwood* v. *Soto, 25th Pacific Reporter, page 488*, we find that the constitution of California, Article II, Section 9, provides that "the compensation of any county; city, town, or municipai officer shall not be increased after his election or during his term of office". In this case it was said that the compensation named in the constitution was for services rendered, and not traveling or other incidental expenses of the office.

The constitution of the State of Illinois, provides that the county board should fix the compensation of all county officers, with the amount of their necessary expenses, "provided, that the compensation of no officer shall be increased or diminished during his term of office".

In *Briscoe* v. *Clark County, 95th Ill. page 309,* the Supreme Court held that it was the salary of the county officers—the compensation for the personal discharge of official duty—which the board was forbidden to change. The compensation or salary was to be fixed in advance, but the expenses were to be determined by the necessity, which the business of the office should develope, and being so, the allowance for expenses could be increased.

The constitution of Wisconsin, Article 10, Section 1, provides that the compensation of the superintendent of public instruction shall not exceed twelve hundred dollars annually. The legislature in providing for the salaries of state officers, directs that the state superintendent shall receive an annual salary of twelve hundred dollars, and in addition thereto fifteen hundred dollars annually for his traveling expenses in making official visits required by law. It was held that where the state superintendent appropriated to his own use the amounts thus allowed for traveling expenses without incurring the expenses contemplated in the act, such appropriation was in violation of the constitution, which directed that the compensation should not exceed twelve hundred dollars annually. But his right to receive the amounts allowed for traveling expenses was not denied. The legislature in this case apparently had the authority to allow necessary expenses for the superintendent. *State* v. *Cunningham, 51 N. W. R. 1133.*

COLLECTIONS.

ERVIN R. PALMER.

That old conundrum—"Why do the birds always look so sad in the morning?"—with its happy explanation—" 'cause their little bills are all over dew"—must have originated in the mind of one blessed with an unusually fertile imagination, or who knows not the sorrows and disappointments which burden the life of the collector. Or, perhaps, the little birds are disposed to look upon their pecuniary obligations in quite a different light from the majority of mankind.

But to the writer, the idea that any mortal or anything could be so sorrowfully influenced by such trivial matters as "their little bills over-due" seems too beautifully poetic to be realistic. For it has generally been my experience, though, I am glad to say, with some exceptions, that those people who owe the most and are the least likely to pay their debts, whether it be from necessity or inclination, always seem to smile the kindliest and receive your calls with greatest warmth and cordialty; and I may add that it is this same class of people, unless you are well accustomed to their ways, who, by their ingenious tales of woeful disappointments of the past, those plausible excuses for the present, or those apparently infallible promises for the future, will retain your confidence the longest, and who cause you to regret most deeply the necessity of enforcing by harsher measures the payment of their debts.

And there is another class of people who look upon this system of debits and credits as a huge joke; and if fortunate enough to secure your goods on credit, they consider it so much clear gain. To illustrate: I once presented a bill to a man who had received his groceries for a whole winter on credit. He had come to the grocer with that distressing story which cannot but arouse sympathy—no employment, with a house full of family, but destitute of provisions. Was the hungry man fed? Yes—be it said to the praise of that tender-hearted grocer. But how about the grocer, did he ever receive his pay? Well, the account ran along for about two years, during which time the idle man had received steady work; and when, at last, the bill was presented to him with a request for settlement, never did man assume more haughty, independent air, and with a

sneering, contemptuous smile wished the grocer to be informed that he would pay that particular bill when he got around to it; and on being questioned as to when that would probably be, he didn't know as that time would ever come. The punishment of such ingratitude should consist of a public flogging vigorously administered by the strong arm of the law.

But, I think the most aggravated form of the "dead-beat" is he of the faultless dress and lordly manner, whose very elegance alone constitutes his stock in trade. It is such as he who teaches the merchant the moral not to judge of a man's character by his (?) clothes. And of all men, this gentleman "dead-beat" is, in my opinion, the lowest type. The ragged pauper who lives along at the county's expense is far more deserving of the pity and kindly forbearance of honest hearts than this gilded nabob of a vagabond, who though being fed and clothed out of his less pretentious neighbor's portion, yet dares to claim his place as a respected member of polite society.

It is when I meet such men that I become the most exasperated and desperate. Once, while endeavoring, by repeated calls, to effect a settlement of an account with one of this peculiar species of humanity, the gentleman frankly admitted that he was very disappointed not to be able to settle the account; but after a moment's reflection, with all due sincerity he thus consoled me: "Well, sir," said he, "if you will kindly call a week from next Tuesday, I think that I will then be able to tell you when to call again."

These several instances which I have given by way of illustration, you may say are overdrawn and exceptional. On the contrary, it represents a steadily increasing class of people who find it much more convenient to let their debts accumulate than to pay them, and the more I see of such dishonesty and imposition, the more thoroughly I am convinced that Exemption Laws which have been established for the protection of the poor and the down-trodden, are not fulfilling their mission, but rather are being used as a shelter by those who, with the least sense of honor, could well afford to pay their debts. It is not the poor fellow who toils along from morn till night and with his miserable pittance is enabled to keep from starving, who receives the benefits of these protective laws, for he could secure but a very limited credit should he wish to. But it is the gentleman of leisure, who takes advantage of every exemption which the law allows in utter defiance of his creditor's claims, who is protected.

It seems therefore, unreasonable and unjust; and it is high

time that a more satisfactory system is adopted, which will more perfectly carry out the purposes for which the protective laws were primarily established. Those laws which once threw the debtor into prison and caused such great hardship and suffering were doubtless extreme and intolerable in their harshness; yet, on the other hand, our present laws are much too lax, and the evils arising from their too ample protection of rascality is deserving of our serious and careful consideration.

But though, my remarks thus far have seemed more or less tainted by feelings of prejudice and dislike, yet it would be shamefully unjust to conclude without alluding if possible, to some of the redeeming features of the work.

Collections are as essential to the young attorney as are the March winds and April showers to the budding of the blossoms in May. To a great majority of the young men entering the legal profession it furnishes the only source of revenue by which, during the first few years of their struggles they are enabled to make a scanty livelihood. Nor is it only of financial profit to the young lawyer, for in the enforcement of these collections he is frequently compelled to hie himself to Court for relief, thereby affording him that much desired opportunity of entering the arena of his chosen profession, there to learn by hard practice his first lessons in the art of legal warfare.

Then too, there are moments even in the collection business, when we lose sight of its usual ugliness and displeasure—moments in which we can rejoice and feel exceeding glad. After all the endless delay is over, whether success is attained after a Job-like manifestation of patience or as the out-come of a bitterly contested lawsuit makes no material difference, for in either case we feel equally happy in receiving that payment so industriously and longingly sought after.

What would you think of a fellow who actually felt ill-treated in not being permitted to pay the sum of 19 cents to apply on an account of $15? Once in my collective rambles I met just such an individual; and he was so thoroughly sincere in his honest intentions and so horribly independent in his poverty that for the moment I was unable to appreciate the humor of the proposition. It does a fellow a sight of good to meet such people for it tends to bolster up and purify our opinion of mankind in general.

There's a little incident a friend once related to me, which strengthens me in my rather wild and insane notion that there are

some people honest enough to pay their debts, but who are only prevented from doing so by adverse circumstances. He told of an account which a merchant once gave him for collection with instruction to push the claim. Nor did he stop there, but abused the person with such energy and liberality and told such a tale of ingratitude on the part of the customer, that my friend started forth with blood in his eye, and thunder in his voice to bring the offender to a quick settlement. But when he got there he was rewarded in like manner to "Old Mother Hubbard, who went to the cupboard." There in a rickety old tumble-down of a shanty he discovered the one to whom he had intended in stern severity to deliver his carefully prepared ultimation. His victim happened, however, to be a poor frail, little lady,—a washer-woman by occupation—who was steadily scrubbing her life away in her efforts to feed the three small children who comprised her family. When the young man appeared at the door, there she was bent over a wash-tub hard at work. Grasping the situation at a glance, he merely inquired if the lady would find it convenient to pay the account at that time, and receiving a tearful appeal for a little longer delay, he assured her that she needn't bother any more about the bill, and with a pleasant smile, he bade her 'Good-day'; and that terrible storm which had been gathering in his mind for the ungrateful customer blew over. But on returning to his much abused client he settled the claim himself and at the same time took occasion to give the merchant a wholesome bit of Christian advice, not forgetting to suggest that sometimes a man can be 'so honestly hard, as to be hardly honest.'

But before closing, I wish to impress upon the minds of those inexperienced in affairs of this kind, that these sorrows and incidental pleasures are not always unmixed with incidents of an enlivening—nay, even of an exciting nature. I recall an experience, which though affording a happy and very amusing conclusion, yet at one stage had seemed serious indeed. I had called upon an Irish lady. She was a very formidable appearing person from a physical point of view—large and muscular, with a countenance none too prepossessing; and it occurred to me at the time that there had evidently been some mistake when she was christened Bridget instead of Patrick O'Toole. But to proceed with the narrative. When I presented the bill, she didn't throw a flat-iron at me, nor did she even salute me with the contents from the water-pail, but simply grabbed a broom and charged, and simultaneously I retreated outside the door. But when she tried to slam the door shut, my foot

prevented it from closing entirely; and, holding it in that position it enabled me to carry on a conversation with some degree of safety. Nor was this protection necessary for very long, for the anger of Bridget O'Toole having somewhat subsided, she seemed willing to make some concessions; and at length the conference behind (partly) closed doors thus satisfactorily terminated: "Shure en Bejabbers, en O'il pay yez the nixt toime yez come if Oi hev to stale the mooney."

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NOTES.

In the MICHIGAN LAW JOURNAL for November 1895, appeared an article questioning the constitutionality of the law of 1895 permitting judges elected in one circuit to hold court in another circuit. This month's number presents an article on the other side, which will prove of interest to all. The question may be presented to the court in Wayne County soon and if so the court will pass upon the question and settle all discussion.

An interesting case was very recently decided in the Appellate Court, First District of Illinois. The case is entitled *Abram F. Doremus, et al.* v. *Mary G. Hennessy*, and is an appeal by Doremus, et al, from a judgment of $6,000 in favor of Mary G. Hennessy, for injuries done by combination and false representations to the business of the latter. The opinion is a well written one and cites among other cases; *Mogul Steamship Co.* v. *McGregor, Gow & Co., L. R., 152. B. Div. 476*, in which "boycotting" is held unlawful and a foundation for a right of suit for damages occasioned by its exercise.

The syllabus of this case if from the Chicago Legal News, and is as follows:

1. The appellee kept a laundry office where she received clothing which people desired to have laundered; and she procured the laundering of the same by various operating launderies, who, when the work was done, returned the same to her for delivery to her customers. The appellants plotted to injure her in her business because she would not increase the price charged by her for the laundering, to the price fixed and required by the Chicago Laundrymen's Association, of which appellants were members, and that for

the purpose of carrying out their design, they induced various parties, with whom she had business engagements, by false representations that she was financially irresponsible, and by threats and intimidations, that the appellants would injure the business of said parties to break their contracts with her to do laundry work for her. *Held*, that the appellee had a right of action, and a judgment of $6,000 was affirmed.

2. CIVIL ACTION FOR DAMAGES—CONSPIRACY—COMBINATION.—The essence of a conspiracy, so far as it justifies a civil action for damages, is a concert or combination to defraud, or to cause other injury to persons or property, which, because of acts done in pursuance of such conspiracy, actually results in damage to the person or property of the person injured or defrauded. A civil action will not lie for a mere conspiracy. It is the damage done in pursuance of the conspiracy which gives the right of action.

3. PUNITIVE DAMAGES may be imposed in actions of this kind."

The sale of the new bond issue by the United States government has proved a success. Nearly 5000 bids were received and the prices offered ranged from far to 120. J. Pierpont Morgan for himself and others offered to take the whole issue or any part of it at 110.6877. There was awarded to those who bid a greater price than this figure bonds aggregating $66,788,650 and to the Morgan syadicate the remainder of the issue, $33,211,350. The results of this bond sale demonstrate the confidence of the people in the stability of the government and in its financial strength.

The difference between this sale and that of last year represents millions of dollars to the credit of the United States. It is said that purchasing at 110.6877 the Morgan syndicate sold half of their allottment of this last issue at 116½ "gold" within two days after the acceptance of their bid. In December last the same syndicate offered only 104¾ for $200,000,000 of these bonds and urged on the President the acceptance of its offer. Last year's issue of bonds representing $62,300,000 in 30-year 4 per cent bonds, was sold by the consent of the President to a syndicate at 104½. And at that time they were able to sell them to the public almost immediately at 118. Some one made a mistake a year ago and it wasn't the syndicate.

The recent cases of the *People* v. *Simpson* in the Recorder's Court of the City of Detroit ought to teach a lesson and occasion a modification of the laws regulating the examination of complaining witnesses in cases of rape. If the life of the complaining witness is immoral and vicious there may be considerable sympathy for the defendant aroused in the minds of the jury, under the ruling made

by Judge Chapin that these facts may be brought out on the examination of the complaining witness. Without going into the merits of these cases it would seem that this ruling is wrong for prejudice once aroused against the complaining witness, it is almost impossible to convict the defendant and if questions can be put to show the character and life of a woman of bad repute, such questions may be asked of any one in the same position however blameless her life. Questions of this kind, even if the answers do not throw the bright light of publicity on hidden vices and immoralities; even if then is nothing concealed of a damaging nature; even if the complaining witness is pure and blameless in her life, yet to cast imputations and slurs on her character. Every lawyer knows from experience, how greatly at times questions immaterial to the issue and utterly irrelevant asked but, on the ruling of the court, unanswered, tend to bias a jury. Criminal assaults are not easily proved at any time but under the ruling in these cases how many pure women are there who, suffering from the shame of such a misfortune, will voluntarily make public their shame for the sake of the good of others, when besides the publicity, they must suffer the agony of a long cross examination imputing in every question a lack of chastity?

There is a field for legitimate cross examination of complaining witnesses in their former relations with the defendant, but beyond this we feel that the public's interest is not subserved by the latitude permitted in the ruling in these cases. Lack of chastity does not necessarily contain argument against credibility, and should not be permitted to go in evidence as affecting it. If a woman's lack of chastity is argument against credibility why is not the defendant's?

LEGAL MISCELLANY.

The Venezuela Commission is very strongly composed. The Supreme Court of the United States is confessedly the most eminent tribunal in the world, and Justice Brewer is regarded as one of the ablest and most deeply learned members of the Supreme Bench. The Appellate Court of the District of Columbia also occupies a very high place, and Judge Alvey has long been held in peculiar esteem by jurists and lawyers. Mr. Coudert of New York has a great international reputation as a lawyer, and his experience has made him unusually familiar with the history, laws and languages of the Latinic countries, whether European or American. The wit, eloquence, and good temper which he displayed, along with much learning, as one of the American counsel before the Bering Sea Arbitration Board, was fittingly acknowledged at the time. The Hon. Andrew D. White, formerly President of Cornell University, and Dr. Daniel C. Gilman, President of the Johns Hopkins University, belong to a group of influential American citizens who hold positions not exactly duplicated in any other country. The president of an American university is at once a scholar and a man of affairs. He represents citizenship in its best form, and stands for the highest national aspirations. President White has filled the great diplomatic positions of Minister to Germany and Embassador to Russia. He is an eminent historical scholar, having in his younger days filled the chair of History in the University of Michigan. It would be impossible to name a man in the entire country better fitted than President White, by virtue of the whole training and experience of a lifetime, to serve upon precisely such a commission. President Gilman also has very exceptional qualifications. Like President White he has been a great traveler. One of his most cherished lines of study has always been geography, both physical and political. He has filled many important public trusts with great acceptability. He is the biographer of President Monroe. Like President White he has a wide acquaintance among the best and most influential Englishmen, who repose confidence in his attainments and know his disinterestedness. These five gentlemen will regard the rights of England as scrupulously as if they had been selected from the ranks of such Englishmen as Mr. Morley, Mr. Bryce, Sir John Lubbock, Mr. Balfour, the "law lords" of the House of Peers, or the Justices of the Queen's Bench.—*From "The Progress of the World," in the February Review of Reviews.*

There are to be two figures representing law in the rotunda of the Congressional Library Building at Washington. One of these is a statute of Moses. It has only recently been cast by the Gorham Mfg. Co., at Providence. It is a production in bronze six feet six inches in height. The figure is shown in the act of delivering the new law to the Israelites. He has just returned from Mt. Sinai where he received the table of stone from the hands of God.

The Court of Appeals in New York recently decided a case which will prove of interest to all who are connected either as investors or borrowers with building and loan associations. The case was that of *William Englehardt, respondent*, v. *Loan Association, appellant.* The opinion is written by Chief Justice Andrews and was filed January 28th. The whole opinion is interesting and decides points upon which authorities differ. A syllabus of the case is as follows:

"A building and loan association, organized under chapter 122 of the Laws of 1851 and amendments thereto, whose articles of association provide that the dues paid in by members shall be refunded to them upon their withdrawal from the association, when the necessary funds are collected, is not bound to repay such dues until the funds for that purpose have been collected.

Such an association may properly provide in its by-laws that, in the case of withdrawing members, their dues shall be repaid in the order in which their applications are filed with the association.

Members are chargeable with notice of the powers conferred upon the association by the act under which it is incorporated, and are subject not only to the regulations existing when they became members, but to such as may be enacted from time to time by the association within the scope of the power given by the statute."

Robert Ray Hamilton died Aug. 23rd. 1890, and left among other legacies one of $10,000 to the City of New York, for the purpose of erecting an ornamental fountain. In 1887 New York State passed a law taxing legacies but exempting from the action of such statute "the societies. corporations or institutions now exempted by law from "taxation." In a case decided January 28th, 1896 in the New York Court of Appeals. *In re Hamilton*, it was decided that the exception did not extend to the City of New York and the bequest taken subject to the tax. The reasons for this decision appear in the opinion.

"The property held by the state, or by any of its municipal decisions, for public purposes, is not, and never has been, subject to taxation. The right to impose taxes is a part of the sovereign power which, for obvious reasons, has never been extended to property which the government itself holds for public use, or which is so held by a municipality. The latter is but a part of the state exercising for

specific purposes a portion of the sovereign power delegated to it.

The property to which it holds the title for public purposes stands upon the same footing, in regard to taxation, as that held by the State itself. The end and purpose of all taxation is to raise revenue for the purpose of defraying the expenses of government, and since no revenue could be raised by imposing taxes on property owned by the State itself, or by any of its political divisions, such property is in no just or practical sense the subject of taxation. It is never supposed to be included in the terms of any law providing for the imposition of taxes, however general it may be, not because it is exempt, in the sense in which that term is generally understood, but for the reason that in the nature of things it never was and never can be taxable. The power of taxation applies to the property of persons, either natural or corporate, within the jurisdiction of the government and not to the government itself. Public property is non-taxable, not upon the theory of exemption, but for the obvious reason that there is no law, and practically never can be a law, making it taxable. Of course a statute might be enacted including it within the operation of tax laws; but since the government would have to pay the tax itself, such a law would be utterly useless.

It is therefore quite plain that when the legislature excepted from the operation of the law now under consideration "the societies, corporations or institutions now exempted by law from taxation," it could not have referred to the state itself or to any of its political divisions. The reference obviously was to such associations, corporations or institutions as would have been included within its general terms, but for the exception or exemption itself. We have seen that the state or any of its political divisions would not have fallen within the terms of the law, and hence, no exemption was necessary in order to relieve them from its provisions. Exemption implies that the person or corporation to which it applies is or would otherwise be taxable. To include public property which is not, and in the nature of things cannot be taxable at all with the terms of an exemption act, would be to do a vain and useless thing which cannot be imputed to the legislature in the construction of the act in question.

It is entirely reasonable, however, to suppose it was intended that when a municipal corporation takes a gift of personal property under a will that the gift is upon the same conditions and subject to the same burdens and deductions as would apply in a case where the bequest was made to an individual. It must, we think, take the gift subject to the payment of the succession tax since it is not included within the exemption which permits certain other corporations to take without such conditions. The gift, less the tax, is what the city takes and the balance is to be paid into the state treasury. There is not, we think, any sound distinction between this case and that of a bequest to the United States, in which we have held that the gift was subject to the tax."

RECENT MICHIGAN DECISIONS.

ACCOUNTING—PROPER PRACTICE ON APPEAL—PARTNERSHIP—EVIDENCE.—Where an appeal is taken from an accounting, the record should show what items were allowed and what disallowed with the exceptions pointing out the disputed questions, and rulings of the court thereon.. Either party may ask the court to follow the practice pointed out in the case of *Barnabee* v. *Beckley 43 Mich., 615*, the failure to do so will be treated as a waiver of the right to raise such questions by appeal.

In an action for an accounting between the complainant and defendant, it was not error for the court to find that a partnership existed between the parties, the evidence conclusively showing that each had an interest in the capital invested and that under an oral agreement between them, complainant was to have a one-third interest.

A finding by the court that the complainant should have paid interest to the co-partnership instead of to the defendant for monies advanced him, and that defendant should be charged with certain mill-culls, was erroneous, it appearing that at the time of the commencement of the operations of the firm, it was agreed that complainant should pay interest to defendant on money advanced to him to carry on the lumbering operations, and that defendant should retain the mill-culls as part of his sawing bills; and that although a new contract was entered into in respect to the mode of carrying on the work, the original agreement remained unchanged and that in the several settlements made on the basis of that agreement complainant made no objections. *Loveland* v. *Peter.* (Dec. 30.)

ACCORD AND SATISFACTION—RECEIPT—WHEN CONCLUSIVE.—Where a creditor accepts money from his debtor, with the knowledge that the debtor claims that the amount paid was all that was due, and gives a receipt in full, such receipt is conclusive and cannot afterwards be repudiated by the creditor.—McGrath, C. J., and Montgomery, J. dissent. *Tanner* v. *Merrill, et al.* (Dec. 30.)

ACCOUNTING—TAXES—TITLE.—In an action for an accounting of the profits derived from certain land contracts entered into between the members of a co-partnership, it was not error for the court to direct that one-half of the taxes on the premises should be charged to the vendees, it appearing that while the contract was silent in regard to the possession and payment of taxes, the lands were wild lands, and that the vendees received equal benefit with the vendor from the lands.

When a contract for the conveyance of land does not describe any particular lands, but purports to convey all the lands "held and owned" by the vendor, the vendees would be only entitled to a conveyance of such lands as belonged to the vendor at the time the agreement was made. *Thompson* v. *Noble.* (Dec. 30.)

CORPORATION LAW—LIABILITY OF STOCKHOLDER FOR THE LABOR DEBTS—EXECUTION—RETURN.—Where the return of a sheriff to an execution shows that it was made on Sunday, it may be shown by the clerk's entry and endorsement on the writ, that the return was actually made on the Saturday preceding.

Where the judgment in an action against a stockholder to enforce a judgment against the corporation included only the amount of the original judgment and interest, the defendant could not complain on the ground that the return by the sheriff to the execution in the case against the corporation did not include the costs.

One who is a stockholder at the time labor is performed for a corporation is liable therefor. *Macomber* v. *Wright.* (Dec. 30.)

CORPORATION LAW—LIABILITY OF STOCKHOLDERS—MEANING OF TERM ASSESSMENT.—Defendants, residents of Ohio, organized a corporation under the laws of that state and issued to themselves all the capital stock as paid up, entering upon the books of the company a guaranty to purchasers of any such stock that it should be "non-assessable" until they should have expended in the enterprise the amount of the capital stock. At this time stockholders were liable, under the laws of Ohio, in addition to their stock, in the amount equal to the stock by them subscribed, or otherwise acquired, to the creditors of the corporation to secure the payment of the debts of the corporation.

In an action against the defendants bought by a subsequent purchaser of the stock.

Held: That the defendants were liable to plaintiff for the amount which he was obliged to pay to creditors of the corporation under the statute above quoted. *Omo* v. *Bernart.* (*Dec. 30.*)

CONSTITUTIONAL LAW—ACT 74 SESSION LAWS OF 1893 CONSTITUTIONAL—AUTHORITY OF LEGISLATURE TO EXTEND RESTRICTIONS TO INDIVIDUALS.—Act No. 74 of the session laws of 1893 prohibiting any person as solicitor from soliciting in this state any insurance business for any person, persons, firm or co-partnership, who are non-residents of this state, or for any company or association without this state, whether incorporated or not, without a certificate of authority from the Commissioner of Insurance, is constitutional and valid

It is within the power of the legislature to prohibit individuals within this state from acting for such inhibited corporations. *People* v. *Gay.* [Dec. 10.]

DECLARATION—AMENDMENT—MANDAMUS.—It is not within the discretion of the Circuit Court, to permit a declaration containing only the common counts to be amended after the expiration of the period of limitations had run, by the addition of counts alleging a breach of a special contract, which could not be proved under the common counts.

Such declaration could be amended by the addition of special counts alleging a full performance of a contract, nothing remaining to be done but the payment of the contract price.

An order of the lower court permitting amendments to a declaration, part of which were properly allowed, will not be vacated on mandamus proceedings. *Flint & Pere Marquette Railroad Company* v. *Circuit Judge.* [Dec. 30.]

ESTOPPEL—CONCEALMENT OF OWNERHIP.—Where one who has the legal title to certain property stands by and permits another, who is in possession under a land contract, to give the same as security for creditors, who took the same without knowledge of such ownership, and without objection on the part of the owner, he is thereafter estopped from claiming title to the same. *Mosher, et al.* v. *Michigan Trust Company, et al.* (Dec. 30.)

LIBEL—COMMENT BY NEWSPAPER ON FITNESS OF CANDIDATE FOR PUBLIC OFFICE—WHEN NOT LIBELOUS.—A newspaper in commenting on the nomination of plaintiff for county treasurer stated that the bondsmen of the preceding county treasurer objected to his appointment as deputy for the reason that they did not wish to become bound if plaintiff had any share in the handling of the public funds.

Held: That such publication was not, as a matter of law, libelous.—Hooker J., dissenting. *Dunneback* v. *Tribune Printing Company.* (Dec. 30.)

MASTER AND SERVANT—FELLOW SERVANTS—CONTRIBUTORY NEGLIGENCE.—Where an employe of a railroad company is killed while passing on a run over the flat cars of a moving train, in disregard of repeated cautions that such practice is dangerous, he is guilty of such contributory negligence as to defeat an action brought by his administrator, although it appear that he was going from one end of the train to the other in response to orders from the conductor of such train.—McGrath, C. J. dissenting. *Saner* v. *Lake Shore & Michigan Southern R. R.* (Dec 30.)

MASTER AND SERVANT—DEFECTIVE MACHINERY—EVIDENCE.—In an action by a railroad employe to recover for injuries received while coupling cars, alleged to have been caused by the defective condition of coupling apparatus, a showing to the effect that the apparatus was defective after the injury was received, is not sufficient to base a finding that it was out of order when the car was inspected, it appearing that the defect might have been occasioned by the force with which the cars came together when they were coupled. McGrath, C. J., and Montgomery, J., dissenting. *Perry* v. *Michigan Central Railroad Company.* (Dec. 31.)

MASTER AND SERVANT—RISK INCIDENT TO EMPLOYMENT—NEGLIGENCE.—Plaintiff, a farm hand, was engaged in removing ensilage from defendant's silo, and in accordance with defendant's orders was taking it from the bottom of the pile, he had taken out about two feet, and in striking at the undermining the pile fell upon and injured him.

Held: That plaintiff must be chargeable with knowledge of the law of gravitation and that having consented to do this work in the face of an apparent danger, he must be held to have assumed the risk as one incident to the employment. *Welch* v. *Brainard*. (Dec. 30.)

MECHANICS' LIEN—AFFIDAVIT—MISSTATEMENT OF AMOUNT OF LIEN.—Where it is apparent that an overcharge made by a claimant in his affidavit to enforce a mechanics' lien is the result of an honest mistake and was not an effort on his part to place a lien upon the premises for a greater amount than he honestly believed his due, it will not defeat the lien. Grant, J., dissenting. *Scheibner* v. *Cohnen et al.* [Dec. 31.]

PROBATE LAW—CLAIMS—WHEN ABSOLUTE—SECTION 5936 HOW. STAT. CONSTRUED—The time for a claim against the estate of a deceased surety on a bond, to accure and become absolute within the meaning of section 5936, Howell's Statutes, providing that "If the claim of any person shall accrue or become absolute, at any time after the time limited for creditors to present their claims, the person having such claim may present it to the Probate Court, and prove the same at any time within one year after it shall accrue or become absolute," does not depend upon the rendition of a judgment against the principal.

Such claim will become absolute, whenever a present liability exists the amount of which may be determined by facts then in existence. *Estate of Hill* v. *John Hancock Mutual Life Insurance Company*. [Dec. 30.]

PARTNERSHIP LAW—ACCOUNTING—RIGHTS OF SOLVENT PARTNER—INTEREST.—In an action for an accounting the fact that one of the parties denied the existence of the partnership, would not deprive him of his right to a just statement of the account between them upon its being found that he was in fact a partner.

A solvent partner has, in the absence of fraud, the right to wind up the concern, which was dissolved by the assignment, and has the power to sell property and pay firm debts, through such agency as he choose, being accountable only for good faith, unless the courts, at the instigation of the assignee, should intervene

Interest cannot be recovered for an excess of capital contributed by one partner on the ground that he contributed his time and money to the partnership, while the other partner contributed nothing in the way of time and labor. *Thompson* v. *Noble*. (Dec. 30.)

REPLEVIN—PRIORITY OF CHATTEL MORTGAGES—ESTOPPEL—EVIDENCE — Plaintiff and defendant both claimed the possession of certain property. Plaintiff by virtue of a chattel mortgage executed by one Hale and defendant under a chattel mortgage executed by a corporation formed after the execution of plaintiff's mortgage and of which Hale was a member.

Held: That the court was not in error in refusing to direct a verdict for the defendent on the ground that plaintiff's mortgage was not on file when defendant extended credit to the corporation and was therefore void as to it; the evidence showing that Hale was the owner of the property at the time the mortgage was given to plaintiff, but failing to show conclusively that the corporation had succeeded to the rights of Hale in the disputed property.

The plaintiff would not be concluded by statements made by Hale to defendant that he had sold the property to plaintiff, unless it appeared that it had knowledge of such representations at the time they were made and kept silent.

2. When an inquiry comes to a bank asking simply for the character and financial standing of one dealing with it, such bank is not bound at its peril to report any loans which the person may have at its bank.

3. It failing to appear that defendant acquired a lien on the property it could not raise the objection that as between the plaintiff and its mortgager the itstrument was indefinite and uncertain for failure to state the amount secured thereby. *First National Bank of Manistee* v. *Marshall & Hsley Bank*. (Dec. 30.)

RAILROAD COMPANY—EVIDENCE AS TO FAILURE TO GIVE CORSSING SIGNAL—NEGLIGENCE IN CROSSING TRACK A QUESTION FOR THE JURY.—Plaintiff's intestate and a companion, two boys, were killed by being struck by a passenger train while attempting

to cross defendant's track. The highway and railroad track ran parallel for some distance, when the track turned and crossed the highway; the evidence tended to show that the view of the track was obscured so that one driving along the highway could not see an approaching train until he reached the crossing. The deceased was killed by a train which was running at a rate of speed to get out of the way of the fast train, and the evidence was conflicting as to whether or not the proper crossing signal was given Two witnesses who saw the boys before they reached the crossing testified that they were exercising due care, but there was no evidence as to their conduct at the crossing.

Held: That there was a conflict of testimomy as to whether or not the crossing signal was given, evidence of witnesses who were near the track and had their attention attracted to the train before the collision, that they heard no crossing whistle and did not see the escape of steam which usually attended the giving of such signal, and properly admitted and its weight was for the jury.

2. That the court was not in error in refusing to direct a verdict for the defendant, and that the question of negligence was properly left to the jury. *Crane* v. *Michigan Central Railroad Company.* [Dec. 24.]

RAILWAY COMPANY—DUTY OF FLAGMAN STATIONED AT CROSSING—NEGLIGENCE A QUESTION FOR THE JURY—DECLARATION.—Where the defect in a declaration is one subject to amendment if pointed out, and no objection to it is raised on the trial below, it will not be held fatally defective on appeal.

In an action to recover for an injury received at a railway crossing, the evidence tending to show that the flagman stationed at such crossing gave the deceased the customary signal to cross, without taking due precautions to see if the track was clear, the question as to whether or not he exercised the care and prudence required of him under the circumstances was one of fact for the jury to determine.

The duty of a flagman stationed at a railway crossing does not consist in looking in one direction, it is his duty to satisfy himself that the track is clear, before signaling travelers to cross.—Grant J., dissenting. *Steele* v. *Chicago & Grand Trunk Railway Co.* (Dec. 24).

REAL ESTATE LAW—SURVEY—EVIDENCE—ADVERSE POSSESSION.—1. A record of a survey made by a county surveyor, which neither shows for whom it is made nor the variation of the magnetic needle from the true maridian, and fails to fix a point as the center of the section, as required by Section 619, Howell's statutes, is not admissible for any purpose.

While the record of a survey which complies with Section 619, Howell's Statutes, is undoubtedly presumptive evidence of facts therein found, whenever, however, other surveys are introduced made by competent surveyors, such survey is of no more binding force than any other, where parties have not acquiesced in it.

2. Defendants removed the fence from the land where it had existed many years and built it upon the line as claimed by them, whereupon plaintiff said he would have a re-survey to determine where the real line was, and would not abide by the survey they had caused to be made.

Held: That such statement would not estop plaintiff from setting up a claim to the land by adverse possession. *Van Der Groef* v. *Jones.* (Dec. 30.)

REPLEVIN—WITNESS—EVIDENCE OF TRANSACTIONS WITH DECEASED PERSON.—Plaintiff, who derived title to certain property leased to defendant, through defendant's landlord, brought replevin for a quantity of wheat claiming it under an agreement between the defendant and his landlord to the effect that crops on the ground at the expiration of the lease should belong to the landlord and testified that defendant had consented to the agreement. Defendant denied having entered into such an arrangement and testified that plaintiff had agreed that he might remove such crops. He further testified, under objection, to a conversation with plaintiff relative to his arrangement with the landlord, then deceased, that the crops on the ground at the expiration of the term should belong to him. *Held*: That such testimony did not fall within the meaning of the language of Section 7545, Howell's Statutes, prohibiting one from testifying as to facts equally within the knowledge of the deceased. *Ladd* v. *Brown.* (Dec. 30.)

CURRENT LITERATURE.

The February *Review of Reviews* is a very interesting number. The Progress of the World, its leading article, treats very cleverly all the issues of the month, the Venezuela controversy, the South Africa difficulties, the school question of Manitoba and what interests greatly the people of this country, a short discussion of matters pertaining to the United States; the new bonds, Utah and the consolidation of New York and Brooklyn. "The Story of Cripple Creek," a history of the development of gold mining at Cripple Creek, Colorado, reads like a chapter from a romance, this followed by "That Flood of Gold," gives a clever idea of the wonderful strides made in the reduction and mining of gold producing ores. The "Right Hon. Joseph Chamberlain," a character sketch, is one of most interesting, sarcastic, ironical and with all well written articles which have appeared in any of the magazines for some time. In addition to these and other special articles the regular departments fill their regular completeness and usefulness. It is a good number of an exceptionally fine magazine.

The Metaphysical Magazine for February continues in its field of usefulness with topics which ought to add to its subscription lists many lawyers who should be as a class interested in the occult and psychic phenomena there recorded. "The Holy Trinity of Science," "Sympathetic Vibration in Nervous Attraction." "An Imaginative Man," "Fire Philosophy and Being," and the usual departments fill up the number.

The February *Magazine of Civics* presents twelve short articles on topics of present interest. "Shall the American Home be saved?" The leading article by William S. Beard is a criticism on the ownership of American homes by wealthy non-residents or resident corporations. It states the facts and tells the evils of such ownerships but does not suggest remedies. The quotation of a sentence or two from the article will be worthy of serious attention; "The Holland Land Company of New Mexico, owns four and one half million acres; Robert Tenant of London owns land equaling two-thirds the area of Rhode Island. Perhaps the most unique, though a less extensive, manipulator of this class is Baron William Scully of London, with some 200,000 acres in Illinois and Kansas, which yielded in 1890 an average ground rent of $2.00 per acre plus the taxes [which the tenant always pays]". Following this paragraph is a review of the evils attending such ownerships as seen in the lack of improvements on the land, and the gradual determination of both land and occupants. Other articles of interest in this number are "Should Marriage Laws be Revised?" "Needed Changes in Municipal Methods," and "Proportional Representation: A Remedy for Municipal Misrule."

The January issues of *Little's Living Age* contain many papers of more than usual interest and value. Among others may be mentioned "Lord Salisbury," by Augustin Filon; "Matthew Arnold in his Letters," by Alfred Austin; "Kashmir," by Sir Lepel Griffin; "The Air Car, or Man-Lifting Kite," by Lieut. B. Baden Powell; "Corea and the Siberian Railway;" "Muscat" by J. Theodore Bent; "In the wild west of China," by Alicia Bewicke Little. "1920," from the *Contemporary Review*, is a thoughtful forecast of the future growth and importance in the world of the Anglican race, and furnishes much food for thought.

Other articles worthy of prominent notice are "The Peasant Life of South Russia," from *Blackwood;* "Purcell and the Making of Musical England," by Frederick J. Crowest; "William Blake," by Alfred T. Storey; "Fighting Thurlow, his Foes and Friends," by W. P. Courtney; "The Lost Ambassador," by Margaret Howitt; "Recollections of Thomas Carlyle;" with many others of scarcely less value.

It will surprise many to learn that alkali lands, besides their plant-killing sal soda, contain in large measure the salts most valuable as plant-food. Prof. E. W. Hilgard is to have an article in the March *Popular Science Monthly* giving the results of certain examinations of the soils of such regions, and telling what has been learned about the means required to make them productive.

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DISQUALIFYING OPINIONS OF JURORS TOUCHING THE MERITS OF THE PARTICULAR CASE.

JUDGE ROSCOE L. CORBETT.

No one thing in the administration of the law is so often the subject of adverse popular criticism as the rejection of venire-men because of opinions touching the merits of the case. In the trial of important causes of much public interest the spectacle is often witnessed of the comsumption of days and weeks in impaneling a jury, and the public are prone to enquire: Could not a jury as intelligent and honest, and as well able to grasp the issues and apply the facts, have been selected in a quarter of the time? Does not the rejection of venire-men because of opinions formed tend to exclude intelligent men who read to be replaced by the ignorant and the obscure? Is not the delay thus occasioned a partial denial of justice in many cases? An editorial recently published in a daily paper of this city, widely read because of its ability, moderation and wisdom, contained the following language: "The selection of juries is reduced to a farce. Competent men are refused because of their proper qualifications, and ignorance, stupidity and venality preferred." The above quotation is but a sample of the criticism often indulged in by press.

Such popular criticism renders it worth while to investigate the reason of the rule, with a view to ascertaining whether the difficulty lies in the inability of laymen to comprehend it, or whether the rule is wrong in principle.

The earliest conception of the jury system was the more the jurors knew about the case, the parties and the character of the wit-

nesses, the more likely they would be to arrive at a correct understanding of the facts in the case; and hence by the ancient common law, and until the reign of Queen Elizabeth, a part of the jurors, at least, must be summoned from the neighborhood of the vill or place where the cause of action was laid in the declaration; but in practice it was found that the jurors coming from the immediate neighborhood were more apt to be influenced by their prejudices and partialities, since which time the writ has run to the body of the county.

It has been the theory of the common law for three centuries at least that jurors should be free from opinions touching the merits of the case; and it is the policy of the law to select jurors knowing as little about the case, the parties and witnesses, as possible. However, at common law, it was not every opinion that would disqualify a venire-man. It was usually considered that an opinion not positive and not expressed would not disqualify. The rule which it is believed the courts of Michigan endeavor to follow, and which is easily understood by all, is that laid down by Chief Justice Marshall in the trial of Aaron Burr. "Light impressions" said he "which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to him." This general statement of the law is easily comprehensible, and its justice no one cares to question.

Then why does the application of the rule cause such wide-spread comment? Manifestly because its application is attended with some embarrassment, principally for two reasons; the more general and constantly increasing circulation among the people of newspapers disseminating knowledge of current events; more extensive social intercourse owing to better means of communication and locomotion. These things call upon the courts to determine more and more often what impressions are "strong and deep" and what will "close the mind against the testimony."

It has usually been considered desirable to obtain a jury without any prepossessions whatever, respecting the facts in the case, but in this country the time has long since passed when that is possible, or perhaps desirable. In England, at the time the rule crystallized, there were no newspapers to speak of circulating among the people, the men who served as jurors were not then so well informed, they

travelled but little, and had limited social intercourse with people outside their immediate neighborhood, and hence in the application of the rule, the courts met fewer venire-men who had heard of the case, or the facts thereof.

That increasing intelligence among the people should render the administration of justice more difficult and less certain sounds paradoxical to most people. The juror to be eschewed is not per se the one who has heard or read of the case and been impressed thereby, but the one whose knowledge thereof has so impressed his mind that he is incapable of viewing the testimony from an impartial standpoint. One of the boons of education is the dissipation of prejudice and the lesson learned that opinions ought to be formed slowly except in imergency, and not until all obtainable has been heard on both sides of the controversy; and the administrators of the law should hail with delight this universal dissemination of knowledge, and use it with profit and pleasure to insure more accurate results. It is often the observation of quite intelligent people that they would rather submit their causes to the judges rather than to juries, impressed as they are with the belief that the method of selection serves to eliminate the well-informed. If in practice such belief is well-grounded, it is certainly contrary to law, for our legislature has wisely ordained that the officers who return the names from the assessment districts shall select men well-informed, of approved integrity, and sound judgment; if this salutary law is honestly complied with by the assessment district officials, and there are returned venire-men of differing degrees of intelligence, as there will be, which has a better chance of a seat in the jury box in the trial of an important cause of some notoriety, the man who reads a newspaper, or the one who does not?

The jury system is an institution hoary with age; it has demonstrated its wisdom and utility all along the centuries, and is intimately interwoven with the genius of our institutions; with all its imperfections it is fairly satisfactory to the people, and will long continue to enrich and ennoble our jurisprudence; but the people ask and demand intelligent juries of approved integrity and any system of selection which fails to secure such ends will meet the condemnation it so justly deserves. Is there no room for reform in the method of impaneling juries? As all the works of men are imperfect so are the institutions of the law, and in its administration we can only hope to approximate perfection; but in the selection of juries, have we kept pace with the changing conditions of the people?

In many jurisdictions, notably in Michigan, the legislatures have not been remiss in the premises, but have enacted statutes destined to meet the changing conditions of the people, but the courts have too often construed such statutes as declaratory of the common law only, and insufficient progress has been made.

In full consciousness of the difficulty and importance of the subject and the authority bearing thereon, I respectfully submit my views as to what the law is or ought to be, ever bearing in mind that common law is a growth, existing in response to a want, and elastic enough to respond to the changing conditions of society; and what I shall say I believe not to be out of harmony with the tendency of present judicial utterance.

In the first place the final decision as to whether the opinion disqualifies ought to be left to the trial judge, and that decision should be disturbed only when it is apparent there has been a palpable abuse of discretion. The trial judge is called upon to determine, from the responses of the venire-man or from other testimony, the question of fact whether he has such an opinion as will preclude his acting impartially as a juror in the cause; the testimony on which his decision is based is usually the responses of the venire-man, and the considerations entering into such decision are manifold: his age, his habits, proximity of neighborhood, acquaintance with the parties or the witnesses, mental characteristics, general intelligence, sources of information, ability to express himself, and power and disposition to lay aside preconceived notions, are some of the many elements which must enter into the conclusion. Considering that jurors come from the people at large, from various occupations and callings, and varying in education and intelligence, it seems not altogether logical to hold that the answers of one venire-man shall be a criterion to judge others, or that any set of responses shall constitute a rule to judge all; rather should the trial judge who has looked into their faces bring to bear his learning and experience in determining from their answers their fitness to act.

The constitution of the state guarantees trial by an impartial jury, and this wise guaranty is committed to the guardianship of the supreme court, but the examination of its decisions warrants the observation that where questions of fact are before it for review, it is loth to disturb the findings of the court below, when there is any evidence to sustain them.

The tendency of legislation and adjudication herein in many of the newer states is toward larger powers for the trial court. In an

opinion lately rendered by the supreme court of South Dakota, the court says: "The statute having prescribed the grounds of disqualification," and I take it the statute has added nothing to the common law disqualifications, "when either of these grounds is found to exist, the trial court will reject the juror; but, if after a full examination of the juror, personally, or by the testimony of other persons, the trial court finds upon the question, its decision will not be reversed unless it is made to appear that there was no legal evidence to support the judgment of the court below upon that issue. In determining the impartiality of the juror, the trial judge is clothed with large discretion, and his finding is not to be absolutely determined by any inflexible rules. Much must depend upon the character of the juror as disclosed by his bearing, and upon his relations to the parties, and many other things impossible to specify. The standard is a man who will act with entire impartiality as a juror in the given case. From the surroundings the trial judge must determine, and from that judgment there is no appeal if it is not exercised in an arbitrary manner, but is a fair legal judgment upon the facts of the particular case as they are presented on the examination."

The mass of adjudication upon this subject has in the main been expended in considering, first, the degree of opinion formed; second, whether the opinion is such that it would require evidence to remove it; and third, notwithstanding such preconceived opinion, whether the juror will say he can render an impartial verdict from the evidence, and that his preconceived impressions will not influence it.

The difficulty experienced in passing upon the first proposition lies in the inability of the venire-men to convey in language the character of the conception in their own minds, and their proneness to characterize it as requiring evidence to remove it. Any knowledge of the issue from whatever source obtained, will make some impression upon his mind, and such conceptions are hard to classify, call them opinions, impressions, or whatsoever we may. The opinion formed becomes dangerous only when it has degenerated into prejudice. What member of this association who has once listened to the testimony in a jury trial, while on the bench, will say, because of such knowledge he is less capable of judging the facts correctly in a subsequent trial? And who would question his ability so to do? Whether the opinion should disqualify, should be referred to the entire gamut of enlightened and liberal knowledge.

Neither should the opinion be tested by the declaration of the

venire-man as to whether it will require evidence to remove it.

"The fact that it would take evidence to remove an opinion would appear to be only the rational adjunct of every opinion formed upon rumor," reasons Chief Justice Marshall in Burr's case. The courts of the different states are widely at variance upon this proposition, some holding that an opinion which will require evidence to remove it, will disqualify, while many others follow the lead of Marshall in the Burr case. Experience demonstrates that many venire-men give expression to what is probably the logical sequence, when they characterize their impressions, however slight, as requiring evidence to remove them, while otherwise their answers indicate they have no disqualifying opinions. Whether evidence, or what evidence, or how much evidence will be required to erase an impression formed in the mind, is a mental calculation the average juror ought not to be required to perform. Rather should the inquiry in the absence of bias, be directed toward the sources of information.

The wide dissemination of knowledge and the advance in popular intelligence through the medium of the press, have rendered it so difficult to obtain intelligent juries without any preconceived opinions as to the facts, that the legislatures in many of the states have quite frecently enacted statutes removing the common law grounds of challenge as to disqualifying opinions, and submitting the matter to the test of whether the venire-man will say he verily believes he can render an impartial verdict according to the evidence and that his previously formed impressions or opinions will not influence or bias his verdict.

It has been urged with much plausibility that this test falls far short of the desideratum, because the most prejudiced are honest in the belief of their ability to act impartially and unbiased, and the natural pride of most men would constrain them to answer the test in the affirmative. Awarding to the trial judge the discretion of rejection notwithstanding such affirmative answer, the above test seems to be the one most desired, and toward which recent legislation and adjudication are tending.

THE BENCH AND BAR.

One of the striking features of American society is the pervading power of the bench and bar in the domain of leadership and influence. It is not a mere casual incident but an integral and enduring fact, and having a happy connection with others in the office of helping forward our American civilization.

Neither the appearance nor continuance of this standing of the profession has been owing to any usurping temper or any wish to encroach on the rights of laymen.

No battle has been fought for the common good where the flag has not been carried by lawyers.

The place in question which the profession occupies has been assigned by a sort of natural selection.

A general sense of the fitness of things and a tacit recognition of the relation of means to ends have been sufficient to lead to the condition. No doubt the position is a great trust and carries with it a vast responsibility. The requirements are not written down in terms in any statute or charter or constitution, but they exist all the same. They will naturally vary with the varying vicissitudes of the people.

It is one of the incidents inseparable from human association that whatever wisdom or ability may appear in any part, it shall contribute according to its measure to the general stock, and the principal is never more operative than where it concerns the relation between the profession and the community.

The curious student might find attraction in an earnest search for the cause of the proneness of our communities to breed lawyers, to be commissioned with so much of general confidence, and to be so charged with varied duties of imperfect as well as perfect obligation.

Perhaps it exists in the blood and is born of a principle on which it feeds and becomes immortal. The men of our breed are wont to insist on government by law and to reject every other, and the meaning as we all know is self government, and the exercise of self government necessarily calls for men who are versed in the law.

No one can overestimate the debt to right and to justice which our judges and lawyers owe in the service of their respective offices.

But we are now regarding them in another attitude.

As judges and lawyers and by the very fact that they are judges and lawyers they possess a quasi public character, and quite apart from that specifically indicated in their commissions.

Their status by common consent brings them into special relations with the community and inspires the community to regard them as exceptionally competent to deal with public matters and to expound the problems in politics which are ever springing up.

True it is that in some vicinities there have been temporary dislikes of lawyers, but the feeling has always been short lived. The natural and ancient confidence has soon returned and the imperative need of legal men has been acknowledged. No doubt these interruptions have generally owed their beginning to the faults or follies of persons in the profession.

The fact that lawyers are essential to our state of society and that the profession is a fixture is demonstrated by the universal recourse to legal men from age to age and by all descriptions of people and the conception of what would follow, were the possessors of legal knowledge blotted out.

Nothing can be more obvious than the province of our judges and lawyers in the formation of opinion and in the shaping of public affairs, and the fact is no less apparent that in the fulfilling of this province we have a legitimate working of a great force which is natural to the country.

We take pride in the circumtance that our society is eminently democratic and that no figment of aristocracy exists. But the best thinkers are persuaded that without some conservative counterpoise fitted to go along with the fiercer and more tempestuous componente we should be shortly precipitated into chaos, and it is laid up among the beliefs of the most considerate students of our institutions that the legal profession constitutes this counterpoise. And the habitual practice of the people in their respect for the magistracy and the bar is a home fact full of meaning in the same direction.

When the passions are aroused and the masses are carried away by the impetuosity of their ideas, or when a section or a class has been set in a blaze of dangerous notions, the mischief may be baffled or controlled or stopped by the invisible influence of the judges and the lawyers. And on the other hand when a piece of tyranny is to be put down or a measure of freedom put up or the time has come for the community to make a wise resolve the cause may find its safest and wisest and most determined friends in the same ranks.

A noble display of this influence and leadership occured in a grand theater in this country in an early day and a great master of political philosophy made it a subject of lofty comment.

In the speech of Mr. Burke on conciliation with America delivered in the House of Commons in March 1775 he adverted to the state of the legal profession in the colonies, the influence of our lawyers and the spirit of freedom they diffused. He said: "Permit me, sir, to add another circumstance in our colonies which contributes no mean part towards the growth and effect of this untractable spirit. I mean their education. In no country perhaps in the world is the law so general a study. The profession itself is numerous and powerful, and in most provinces it takes the lead. The greater number of the deputies sent to the congress were lawyers. But all who read, and most do read, endeavor to obtain some smattering in that science. I have been told by an eminent bookseller that in no branch of his business after that of popular devotion, were so many books as those in the law, exported to the plantations. I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England. This study renders men acute, inquisitive, dexterous, prompt in attack, ready in defence, full of resources. In other countries the people more simple and of a less mercurial cast, judge of an ill principle in government only by an actual grievance; here they anticipate the evil and judge of the pressure of the grievance by the badness of the principle. They augur misgovernment at a distance and snuff the approach of tyranny in every tainted breeze."

Not many years subsequent to this notable tribute to the patriotism and happy consequence of the colonial lawyers, the virtues which Mr. Burke had so commended, were signally displayed on a great field and the result so precious for us and for the world is destined to outlive the empires of the east.

The formation and adoption of the federal constitution were achievements of the profession.

Even after the convention had submitted the plan to public judgment, its acceptance hung for a long while under vital peril, and it required at last all the efforts and influence in its favor of the masters of the law acting under the leadership of Jay, Hamilton, Madison and Marshall.

Another example soon followed.

The conclusion of peace had called to general notice the important fact that a great body of debts from the people of the union to

their late enemies, and which had arisen prior to the war, were regarded by the creditors as lawfully outstanding and according to their views of commercial rectitude legitimately payable. These debts had grown up through the intercourse of trade and in some considerable degree under the pressure of a policy hostile to colonial interests; and it shortly became a heated question whether these debts with their additions of interest ought not to be wiped out by confiscation.

The motives to oppose payment were conspicuous and powerful, and arguments were not wanting to convince those whose interests or whose tempers favored repudiation.

There was great force in the statement that these debts were in substance and in justice nothing else than evidence of a political duress under which our people were long held by the government we had thrown off.

But other considerations operated. The ravage of war and the breaking up of enterprises and industries had reduced the country to poverty, and so complete and general had this poverty become that money was lacking for ordinary domestic wants, and the immense mass of government notes which had been issued to maintain this great cause had ceased to be other than reminders of the emptyness of "fiat money." Even the means were wanting with which to pay anything to the surviving veterans or to save from distress the families of dead heroes. And finally there existed an intense bitterness against England and which with many was extended to individual Englishmen. Our fathers had not alone to contend against men of their own line, but were compelled to encounter hirelings and mercenaries from the continent and merciless savages from the woods.

It is not surprising that a stern resentment survived the actual conflict. Indeed, it was a part of my own early experience to know many of the participants in the struggle and to be a frequent listener to their recollections and opinions, and I well remember how their eyes would flash at the mention of obligations to the "British."

Such in part were the conditions when the question of repudiating the debts held by British subjects demanded attention. The force of selfishness, the stress of poverty, a belief that the holders of the debts had not only made these necessary but had caused the poverty, a sharp sense of injustice and a bitterness not ready to be appeased were all arrayed in opposition to the debts. The notion that they ought to be rejected swept over the country like a tempest

and for a time this view appeared really irresistible.

But at length the judges and the lawyers of the period, true to their places and their discipline, bravely and calmly entered the lists and appealed to "the sober second thought of the people."

The whole case was was fairly and fully argued on the broadest grounds of morality and policy. The duty to do right for right's sake, the sanctity and absolute good faith required in human dealings, the inviolability of contracts, the injunction against setting off one wrong against auother, our obligation to acquit ourselves of our engagements, and the duty laid upon us by the occasion to present the new world to the old in a character most resplendent, were expounded and enforced with convincing power.

Our fathers in the profession won, and the lustre of their achievment is a continuing aureole around the flag. No nobler lesson was ever taught and it ought to come home to us all.

But why, it may be said, are these things dwelt on? It is because a recurrence to worthy examples is always profitable, and particularly because contemporary events seem to summon the profession to resembling tasks.

We are now in the midst of erratic and troublous times.

The great civil convulsion of the recent past and the enormous influx of of foreign malcontents have caused disturbing influences and led to false theories and to mendicant and criminal projects and methods.

As a consequence our system is threatened with serious perils.

The Americanism which is our inheritance and our pride, the Americanism which has built up our institutions, the Americanism which is intentive to those who have grown up in it, the Americanism which respects justice and order and the supremacy of law and the rights and interests of individuals, the Americanism which is bound to suppress mob-rule and criminal combinations is being endangered by alien and crazy ideas and conduct born of ignorance and misrule.

Instead of hearing no voice not attuned to our civilization and our institutions, and seeing no proceeding not congenial to American principles our ears are perpetually stunned by the wild cries of adventurers and charlatans, and our eyes are insulted by the freaks and violence of anti-Americans amongst us. These persons are active professors of misrule. Those who are not conscious criminals look on civil freedom as identical with license and lawlessness, and strange to say, the infection of this alien mischief is liable on oc-

casions of outbreak to be communicated to those who have been educated to better things.

At no period for many years has the situation in this country more earnestly appealed to the bench aud bar for the considerate exercise of that intelligent and patriotic though conservative influence which they are so qualified to exert.

The moral franchise in their keeping is in the nature of a trust and we cannot abdicate our duties.

There are many evils now in the air, not to mention some which have lightened, which need to be scared away by the sun light of wise and heroic counsel.

No one will construe these observations as implying that the bench ought to plunge into party politics.

The absolute abstention of judges from the activities of party is so obviously necessary that a suggestion to do otherwise would be a downright affront.

The influence by them on behalf of law and order and sound principles may be correctly and potently expressed through being known to be on the right side and by allowable speech and personal example.

Finally let us resolve to mend only as directed by sound American thinking and to stand by the old landmarks and not sail away into the unknown nor tumble headlong into any witch doctored caldron.

WHAT THE COUNTRY'S WELFARE DEMANDS.*

HON. JOHN P. ALTGELD.

You ask what the 2,000,000 of Christian Endeavorers can do to advance the welfare of the country. As you look to other sources for light from a religious standpoint, you naturally expect me to answer from a purely secular point of view.

Your country, like your God, demands reality, demands earnest purpose. It demands absolute honesty and candor.

This country never before called so loudly and so earnestly as it does to-day for character, for real manhood and womanhood, not of the dazzling, showy kind that depends on wealth and fashion, but that quiet, self-reliant manhood and womanhood that seeks only the right and dares to do it. This country is calling loudly for strong public men, who shall stand for principle and be leaders of thought, instead of being only torchlight heroes.

In some portions of the world governments seem to be only gigantic machines which serve as a convenience for despoiling the people, and those governments do all in their power to prevent the enlightenment of the masses.

In this country, government being in the hands of the people, has been conducted for a century on the theory that it should be their protector and not their despoiler.

I will not discuss the question as to what effect the recent great concentrations of capital and consequent corruptions are going to have. They will, however, produce the same results here that they have produced in all countries and in all times where they abounded unless we can find some different method of dealing with them. That result has been summed up in the lines:

"Ill fares the land, to hastening ills a prey,
Where wealth accumulates and men decay."

Everything, therefore, depends on character, on manhood and womanhood. If these shall decay there will be little left worth preserving. The government will be what the people make it. If

*A letter by Governor Altgeld to S. L. Mershon, Chicago.

they possess earnestness and high principle so will the government. If they are rotten at heart, it will be also.

Among all people and in all countries, wealth, power, and fashion go together. They arrange themselves at the top, and, impelled by the eternal law of selfishness, they assume to control everything in their own interest without considering how others may be affected. As the press is controlled by wealth it is on that side, and the elements at the top, whether in society or nature, tend to form a crust which bears more or less heavily on the elements beneath, and naturally tends to resist any upward movement of what there is below. On the other hand, the Almighty seems to have decreed that for a healthy existence of society there must be a constant development, a constant growth from the bottom upwards.

All great reform movements have emanated from the bottom. Even the Christian religion came not through the splendor at the top but through the suffering at the bottom.

Under the fierce law of competition any upward struggle encounters resistence from the elements above. In some cases the crust had become so hard and formidable that it could only be broken with human blood. But under republican institutions there should be such a constant upward movement from the people and such a constant development that no formidable crust could be formed to resist farther growth.

As the elements at the top are the most attractive and possess those things that are sought after by men, theirs is always the fashionable, and even popular, side, and those people who constitute what is sometimes called the "hanging-on class" are always arrayed on that side and are generally the most loud in denouncing any innovation.

At the time of the Revolution the fashionable people were Tories. During the slavery agitation most of the wealthy sympathized with the slaveholders. Even cultured Boston closed its doors to such a splendid specimen of noble and cultured manhood as Wendell Phillips. The early temperance workers were not only denounced, but were egged. In fact, every movement that has benefited humanity has met the fierce hostility of those people who claimed to possess the intelligence and culture of the time, and who should have been friendly.

What is still more remarkable is the fact that this hostility assumes to speak for patriotism. The Tories talked patriotism. The abolitionists were denounced as agitators who disturbed the peace of

the country. The temperence advocates were condemned as fanatics who disturbed the good order of the community. The legislation to take women and children out of the mines in England and the subsequent movement to shorten the hours of labor from fourteen and fifteen to ten were bitterly opposed, even by the bishops in Parliament, on the ground that it threatened the supremacy of England.

In this country every effort to bring about a permanent improvment in the conditions which surround the men who toil with their hands is denounced as dangerous agitation. No matter what wrong you attempt to right, there will be people to denounce you, and generally they will be people who are in some ways good people, and who make much pretension to respectability. You will find that the side of the strong will always be the most ably and the most forcibly presented through the press and otherwise, while from the very nature of the case, the side of the weak, even when right, will be imperfectly presented. Consequently the public is often misinformed, so that public sentiment for a while will often run against the right. It was so even in Christ's time. Yet if you would serve your country you must do justice—justice to the weak as well as the strong, and you must not stop to inquire what will be popular.

Therefore, unless you are prepared to stand alone, and be utterly independent and indifferent as to who approves or who disapproves it will not be worth your while to think about doing much for your country. In that case it will not be worth while to get accurate information on any public question nor to have convictions on any subject, for it might be inconvenient to suppress them. Just accept newspaper statements and misstatements and go with the crowd. That is the course usually pursued by the people who seek popularity, and, although it is a sign of weakness, yet it is the easy way.

On the other hand, if you are prepared to serve your country in the same manner as you must serve your God, to be heard by him at all—that is, be deeply in earnest, ask only what is the right, seek for facts, have convictions, and act on them and care not who approves or disapproves. If you believe that public men should be positive leaders instead of weak followers then I repeat your country is calling for you, and I will remind you that the despised teachers of one age often become the heroes of the next and that those measures which have to be nursed through great tribulation in one age often become the controlling forces of the next—in fact, become in turn themselves a part of the crust and have, in time, to give way to new forces. I will further remind you that the great men and

women of the past who led the human race onward were not reared, as a rule, in the lap of luxury; they came, as a rule, from the bottom and not from the top, they were familiar with hardships, and were acquainted with sorrow.

The lesson of their careers is one that one hour spent in contemplating the stars and gazing into the silent depths of the universe will lift you higher and carry you farther, will give you more lofty purpose and elevation of soul than would a whole year spent in the most splendid drawing-rooms of the land.

CODE vs. COMMON LAW.

SAMUEL MAXWELL.

In 1848 N. Y. passed "an act to simplify and abridge the practice, pleadings and proceedings of the courts of this state". The preamble to the act was as follows:—"Whereas it is expedient that the present forms of actions and pleadings in cases at common law should be abolished, that the distinction between legal and equitable remedies should no longer continue, and that a uniform course of proceedings in all cases should be established" therefore, etc. Then followed a definition of an action and a special proceeding. Some changes have been made in the phraseology of these provisions since that time, but the principles involved have been retained, and the distinction between legal and equitable remedies has been abolished as far as it is practicable to do so, while there is but one form of action in all cases, either legal or equitable, or both, and that is denominated a "civil action." In 1849 an amendment was passed, which declared that the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing are abolished." The New York Code has been the model for the other code states and its leading provisions incorporated into all the codes, and apparently into the English Judicature Act of 1873.

There are also provisions, that facts of which the courts take judicial notice, and presumptions of law need not be pleaded. Under such a system the facts alone upon which the plaintiff's right to recover depend, should be pleaded, whether the action is legal or equitable, and it is the duty of the court to apply the law to the facts pleaded and proved, and it is unnecessary even in an equity case to anticipate a defense. So all causes of action of the same class may be joined, although some of them be legal and some equitable, provided the relief sought is consistent with such joinder; and equitable defenses may be interposed to legal claims.[1] Thus suppose a cause of action is brought in ejectment to recover the pos-

1. Phillips v. Gorham, 17, N. Y. 270; Dobson v. Pearce, 12, N. Y. 156; Crasy v. Goodman, 12, N, Y. 266.

session of real estate, the defendant may plead as a defense a contract of purchase with the plaintiff, and if the facts will justify and he desires such relief may have specific performance of the contract in that action.[1] In such case the answer must set forth all the facts which a plaintiff would be required to allege in his petition to entitle him to a performance of the contract.[2] If, however, the defendant does not seek affirmative relief but merely insists upon his right to the possession as against the plaintiff, and this right does not require the aid of equity he may prove his defense under a general denial. A cross bill is unnecessary where the relief sought is against the plaintiff, as all rights in favor of the defendant and against plaintiff may be set up in the answer.

If, however, one or more defendants have a claim against other defendants in regard to the property involved in the suit, or a defendant had a defense in connection with one not a party but who is to be brought in, a cross-bill is necessary.[3] New and distinct matter cannot be introduced by a cross-bill, as it is auxilliary to the original action touching the matters in question in the bill.[4] The relief granted to a defendant however, either under an answer in the nature of a counterclaim or cross bill, may be broader than under the chancery practice. It is claimed that the code system has resulted in multiplying reports, but this is a mistake, and the States of Michigan and Ohio show it to be so. Ohio was admitted into the Union in 1802, and has but few more than 70 volumes of reports in all, while Michigan admitted in 1837 and with a much smaller population than Ohio has already over 100 volumes. It is true New York has multiplied reports. The reason is, it is the leading commercial state and has been for one hundred years. The reports of its higher courts therefore are very valuable, and their high reputation attaches in part to the reports of its inferior courts, some of which are of but little value.

One of the most important distinctions between the chancery procedure and that of the codes is in the answer in chancery. Such answer, when required by the plaintiff to be under oath and is responsive to the allegations of the bill, must be overcome by the testimony of two witnesses.[5] This is restricted, however, to facts

1. Dale v. Hunneman, 12. Neb. 221.
2. Dale v. Hunneman, 12, Neb. 221; Dervey v. Hocy, 15, Barb. 365; Dupont v. Davis, 35, Wis. 631; Bruck v. Tucker, 42, Cal. 346.
3. Harrison v. McCormish, 69, Cal. 616; Mariott v. Clise, 12, Colo. 561.
4. Ayers v. Carver, 17, How. 595.
5. Cross v. DeValle, 1 Wall. 14, Maxw. Code pl. 551 and cases cited.

stated by the defendant within his own knowledge.[1] In such case, if the bill is supported by the evidence of only a single witness, the court will dismiss it.[2] But the corroborating testimony of an additional witness or of circumstances may overcome the answer,[3] and circumstances alone may be stronger and more conclusive than the testimony of a single witness.[4] Under the code system, however, the answer, even if under oath, is not evidence in favor of the defendant, and need not be overcome by the testimony of two or any number of witnesses, but, as a general rule, the defendant, by a denial thereby, requires the plaintiff to prove the charges in his petition, and the decision is to be rendered according to the weight of the evidence, as it may preponderate in favor of the plaintiff or defendant. There is a great deal of misapprehension in the common law states in regard to the code system. The code merely simplifies the procedure and avoids circumlocution and the use of unnecessary allegations, forms, and verbiage. Judge Willard in the first edition of his admirable work on Equity Jurisprudence, has stated the rule in the code states. "The continuance of equity as a distinct branch of jurisprudence and of the application of equitable as well as legal remedies are plainly inferable from the language of the code. and have been repeatedly recognized by the courts. The former names of actions are dispensed with. The subject matter which constitutes the bases of the claim to relief must be stated now as formerly, but the cumbrous phraseology which sometimes obscured the facts in a former bill in chancery is dispensed with, and the material facts alone in distinction from matters of evidence are required to be set forth."[5] Every right which either a plaintiff or defendant may possess in a case may be protected and enforced under the code system, as certainly and efficiently, and more speedily than under either the common law, or chancery practice.[6]

1. Russell v. Russel, 54 Ill. 250; 1 Greenleaf, Ev. secs. 260, 261.
2. Fryear v. Lawrence, 4 Gilm. 325; Hitt v. Ormshee, 14 Ill. 235.
3. 1 Greenleaf, Ev. sec. 260.
4. Cooth v. Jackson, 6 Ves., 40.
5. Pember v. Mathers, 1 Bro Ch., 52; Clark v. VanRemisdyk, 9 Cranch, 160. Maxw. Pl. and Pr. (6th ed.) sec. 673.
6. Willard's Eq. Juris. 37; Wilcox v. Saunders, 4 Neb. 587.
7. Wilcox v. Saunders, 4 Neb. 587.

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NOTES.

The report of the committee of the Detroit Bar Association heretofore noticed in the MICHIGAN LAW JOURNAL suggesting changes in the court rules and practice in Wayne County, was not adopted except as to the portion recommending a change in the appointment of jurors. The remainder of the report was referred back to the original committee increased by the judges of the circuit court for the county of Wayne. Action on the rest of the changes recommended will be awaited with considerable interest.

Frauds on the county of Wayne perpetrated through the coroners, have brought into the light of publicity an obscure corner of politics and disclosed an office whose very duties are to the lay mind as indefinite as the thoughts of the man in the moon. Many people of the city of Detroit have been asking themselves: "What are the duties of the office of coroner?" And many lawyers have been questioning themselves as to what is the necessity for the existence of the office. Its duties could as well be turned over to the police or to the prosecuting attorney. It is a burden to the taxpayers without a corresponding benefit. It ought to be abolished. Here is a great opportunity for a legislator who desires to start a reform.

We sometimes credit Canada with being slow and yet one thing suggested by the present discussion in Congress of postal rates brings to mind a scheme adopted by Canada which is in advance of any on this side. They have there what is called a private postal card. Every firm has a style of its own and with its own name on it. The back is left blank as on an ordinary postal card; the front contains the regular business ad. of the firm using it. Until stamped with a one cent stamp it is a business card, afterwards it is a postal card. They have grown quite popular and much used.

Several bills regulating postage rates are under consideration in Congress. Mr. Smith of Illinois has introduced a bill reducing letter postage from the present rate of two cents an ounce or fraction of an ounce to one cent a half ounce. This bill ought to be passed. At present the government derives a very great profit from first-class matter and while this bill would reduce that profit it would distribute the burden of expense of sending letters more equally. It is probable too, judging from past experience, that the increased use of the mails for first class matter would make the revenue to the government almost equal to its present receipts from the same class. The only difference would be in the saving of one cent to the sender on letters weighing a half ounce or less, and a like saving on those which only overrun a little the even ounces. The saving to the sender of the largest packages would of course never be greater than one cent. Another bill which has been introduced and which should be passed is that of Mr. Loud, regulating the transmission of free matter by express or freight, where there would be a saving to the government by such a method. A third bill also introduced by Mr. Loud is not so clearly a wise measure. It is intended to amend the postal laws relating to second class matter. The reasons which urge the adoption of the measure are briefly these: There has been a loss to the government by reason of the difference between the receipts and the expense of handling the second-class matter. This measure would remedy that to a great degree. It is framed moreover to strike the publishers of cheap editions of novels and stories by excluding them from this class. This too would be a good thing. Now the reasons against its passage in the present form from the standpoint of a newspaper publisher are these: Section 5 of the act requires publishers who are permitted to mail matter of the second-class to separate the same, before mailing, into United States mail sacks or bundles by states, cities, towns and counties, as the Postmaster-General may direct, thus forcing every publisher to establish in his office a miniature post office, and entailing great extra expense. Other objections are that the act excludes from the mails as second-class matter, all "sample copies" of newspapers and periodicals, depriving all classes of publications of one valuable means of extending their circulations. And the second class rate is also limited to actual subscribers described as those "who voluntarily order and pay the same" thus excluding the large class whose subcriptions have expired but who would probably continue and eventually pay for the same. Other objections could be urged, but these are the most important. The act should be passed but in an amended form so as to remedy these objections. It has much to recommend it even as it now exists.

LEGAL MISCELLANY.

FINES IN ATHENS.—The income of Athens from fines appears to have been considerable, and to have constituted a singular and permanent feature of the fiscal policy of the state. Its method of assessment may be best illustrated by examples. Thus, if duly authorized officials did not hold certain assemblages, according to rule, or properly conduct the appointed business, they had each to pay a thousand drachmas ($200). If an orator conducted himself indecorously in a public assembly, he could be fined fifty drachmas (ten dollars) for each offense, which might be raised to a higher sum at the pleasure of the people. A woman conducting herself improperly in the streets paid a similar penalty. If a woman went to Eleusis in a carriage, she subjected herself to a fine of a talent ($1,180). In the case of wealthy or notable persons, fines for omissions or commissions in respect to conduct were made much greater, and so more productive of revenue; and there were very few notable or wealthy citizens of Athens who under the rule of demagogues, and through specious accusations of offenses against the state or the gods, escaped the payment of heavy fines; the experiences of Miltiades, Themistocles, Aristides, Demosthenes, Pericles, Cleon, and Timotheus being cases in point. Every person who failed to pay a fine owing to the state was reckoned as a public debtor, and was subject to imprisonment and a practical denial of citizenship; Miltiades, the victor at Marathon, for example, having been cast into prison (where he afterward died) through an inability to pay a fine assessed against him of fifty talents.—*From Taxation in Literature and History, by* David A. Wells, *in Appletons' Popular Science Monthly for March.*

A curious feature of the fiscal policy of Athens was an indirect augmentation of the public revenues, by diminishing the public expenditures by an institution which was essentially one of differential exaction (miscalled taxation), and was known as "liturgies." They consisted in the conferring upon ambitious and wealthy citizens certain honorary public offices to which nothing of salary or compensation was attached, but which entailed large expenditures for the entertainment of the people or defense of the country. The acceptance of these offices was compulsory; parsimony in expenditure on the part of the

holder exposed him to public censure; and the institution undoubtedly found favor with the masses as a method of dividing the property or consuming the incomes of the wealthy. The system of liturgies was not, however, peculiar or restricted to the Athenian state. It existed in the Greek cities of Asia Minor, and also to a certain extent in Rome, where the persons accepting the office of ædile, whose business it was to take care of public edifices and superintend public festivals, were expected to appropriate large sums from their private resources for the convenience and amusement of the people. The office of ædile in Rome, which was one of great honor, was thus only made accessible to the very wealthy. But as the office was, however, in the direct line of preferment to some lucrative office in the provinces, the expenditures of its occupant were probably regarded in the light of an investment, from which more than complete remuneration was to be expected in the future.—*From taxation in Literature and History, by* David A. Wells, *in Appletons' Popular Science Monthly for March.*

The national supreme court in a late case, the opinion in which is by Chief Justice Fuller, held that abraded coins of the United States are a legal tender. The case decided was as follows: James E. Morgan was ejected from a car operated by the Jersey City and Bergen Railroad company, the conductor refusing to accept for fare a 10-cent piece worn by abrasion. Morgan brought suit against the company and recovered judgment for $315 and costs, and the judgment was affirmed by the supreme court of the state. The company took the case to the national supreme court on a writ of error. The common sense and common justice of the opinion are apparent. People can not carry around a set of scales with them to weigh coins and determine the extent of abrasion.—*The Legal Advisor.*

Judge Ritchie of the supreme court of Maryland has rendered a decision that the purchaser of a sleeping car ticket can sell it for the latter part of the journey if he gets out of the car before reaching the destination of the ticket. The railroad company admitted the right to transfer before entering upon a journey, but held that after starting upon a trip the holder of a section forfeited his rights if he abandoned the train before arriving at his destination. The court holds that there is no analogy between the contract entered into on a regular trip ticket and that implied by the sale of a sleeping section. In the former case a break in a continuous trip and a resumption of the journey at the passenger's pleasure would be a hardship on the company, which had provided accommodations based on ticket sales, and which would be forced to transfer a passenger's baggage from one train to another, besides suffering delay and hindrance not contemplated.—*The Legal Advisor.*

The shortest sentence ever imposed by the courts of the District of Columbia was that pronounced in the case of Miss Elizabeth M. Flagler, indicted for manslaughter in shooting Ernest Green, a colored boy, in August last, while he was in the act of stealing fruit. The defendant entered a plea of guilty of involuntary manslaughter, which was accepted by the Government, and Miss Flagler was sentenced to pay a fine of $500 and be imprisoned for three hours in the District jail. The defendant was represented by Judge J. M. Wilson and Mr. R. Ross Perry, and the Government by District Attorney Arthur A. Birney.

Rothschild & Co., a mercantile house of Chicago, proceeded to build some "storm houses" on the sidewalk before the entrances to their salesroom. They had obtained an order from the city council directing the commissioner of works to issue a permit for that purpose. The mayor vetoed the order and no permit was issued. The police authority stopped the procedure. The firm filed a bill in chancery, got a temporary injunction on the city, and went on with their building. The master to whom the matter was referred, reported recommending that the injunction be made perpetual. The city traversed the report, and on a hearing Chancellor Horton dissolved the injunction, dismissed the bill and entered an order that the said storm-houses be forthwith removed from the public highway.

In deciding, the honorable chancellor said: "The public has the right of free and unobstructed use of the streets and sidewalks of the city. The law does not sanction any private use thereof to interfere with such right of the public, except such temporary use in connection with and incident to the abutting property as may be necessary to the proper enjoyment of the property and such as shall not exclude the public. The contention of petitioners that the building of these storm-houses on the sidewalk is a necessity and therefore permissible is not tenable. The only necessity that existed was the desire to save so much space in the salesroom by appropriating to private use a portion of the public sidewalk. The injunction is dissolved and the bill dismissed."

While the decision only affirms a well-established and generally understood principle of law, it is of interest because there always have been, and perhaps always will be, persons who try to bamboozle themselves with the notion that their own selfish desires give to them a right, on the pretense of necessity, of appropriating to their own use that which belongs to others. *The Legal Advisor.*

The New York Court of Appeals decided on February 25, 1896, an interesting case. It was that of the People of the State of New York, respondent, v. Martin V. Strait, appellant. The syllabus is

as follows:

"Witnesses who are not experts, after testifying to facts and incidents in relation to a person, tending to show soundness or unsoundness of mind, may testify to the impression produced upon them thereby, and as to whether the acts and declarations testified to impressed them as rational or irrational; but they cannot be permitted to give an opinion as to the general soundness or unsoundness of mind of the person, or as to his mental capacity.

The opinion of a physician, as to the sanity or insanity of a person, can only be given after the jury has been informed of the facts upon which he bases his opinion, in order that they may determine whether his conclusions are well founded.

The defendant was charged with the murder of his wife, and the defense was insanity, which his counsel claimed was caused by his wife deserting him and breaking up the family. The defendant had obtained a divorce from his first wife some ten years previous to the killing of his second wife. Upon the trial the District Attorney was permitted to show, under defendant's objection, that after the defendant had separated from his first wife and before obtaining a divorce from her he lived with a Miss R., whose general reputation was that of a sporting woman. The court allowed this evidence upon the theory of showing the defendant's regard for the sacredness of the family relations, as bearing upon the probability of his mind becoming unbalanced by the breaking up of those relations. *Held* error."

A recent case decided in the Court of Appeals of the District of Columbia is an interesting one, and is entitled The Ohio National Bank of Washington, Appellant, v. Randolph D. Hopkins, Notary Public. The points decided are as follows:

1. The fees of a notary public for services rendered by him are all fixed and determined by law; and for the performance of such services he has no right to ask more or less than the fees prescribed, nor has any person for whom such services are performed the right to require him to render them for less than the fees fixed by law.

2. A bank owning paper protested or noted for protest is bound to pay the fees prescribed by law for the official service rendered; and where the bank, in employing a notary in his official capacity, is a mere collecting agent for its correspondents, it is bound to place the paper in the hands of a competent and careful notary and pay him the lawful fees for his services, and charge the same in the account to the correspondent for whose benefit the service was rendered.

3. An agreement between a bank and a notary public, that in consideration of the bank employing the notary to do its notarial work, he would accept in full payment for his services one-half the usual and legal fees chargeable therefor, the remaining one-half to

be retained by the bank as its own, is without any valid consideration, and therefore void.

4. Such an agreement is also void because in contravention of sound public policy.

5. The agreement is, in effect, an assignment of one-half the fees to be earned by the notary in future, and this is not allowable. An assignment by a public officer of the salary or fees of his office before they are due and payable, is contrary to public policy and void. *Maguire* v. *Corwine, 101 U. S. 108*, applied and followed.

6. An affidavit of defense setting up such an agreement in an action by the notary to recover the amount of notarial fees received for and on his behalf by the defendant bank, is insufficient to gratify the requirements of the 73d Rule, and the plaintiff is entitled to judgment under the rule.

7. In this case, the action not being founded upon the illegal agreement set up in the affidavit of defense, but upon an independent consideration not controverted by defendant's affidavit, judgment under the rule was properly entered.

8. The test, whether a demand connected with an illegal transaction may be enforced at law, is, whether the plaintiff requires any aid from the illegal transaction to establish his case.

BOOK REVIEWS.

THE PRINCIPLES OF THE AMERICAN LAW OF BAILMENTS.—A Companion to the Author's Work on Contracts. By JOHN D. LAWSON, LL.D., Professor of Common Law of the University of the State of Missouri. St. Louis: The F. H. Thomas Law Book Co. 667 pages.

On all titles of the law except perhaps that of practice it is a fact that thoughtful students are better qualified to write law books than lawyers, however brilliant may be success or extensive the practice of the latter. A good law book treating of a special branch of the law ought to be measured more by its embodyment of the philosophy and reason of the law than by an exhibition of the more general information quickness in repartee, shrewdness in cross examination or capacity for retaining a special knowledge of the case which together make a lawyer successful as a counsellor and practical as an advisor. A writer of law books should have the quality of mind which makes a good judge rather than that which makes the sucessful lawyer. This volume on Bailments is by John D. Lawson, professor of common law at the University, of the State of Missouri. His constant study in this branch of the law and his familiarity with it is seen on every page. The existing text books on the subject are all considered, and the best of their ideas embodied in an excellent way. It is sure to be a volume much consulted and deservedly so, but possibly a matter which others would praise we feel called upon to criticise; his classification and arrangement of bailments. The division of bailments by Chief Justice Holt was into six classes; that of Sir William Jones was into five; that of Judge Story into four; Kent into three; and this into two classes. Kent's division was based on the benefits to the bailee, to the bailor and to both bailee and bailor. Jones followed practically Holt's classification but consolidated two of the latter's classes. This work makes only two classes; the ordinary bailment and the exceptional bailment. The devision into these two classes it seems to the writer occasions sub-divisions under the first head which could be avoided by the adoption either of Kent's or Jones' arrangement. Perhaps Kent's arrangement with a division of the third class into "ordinary bailments" and "bailments to common carriers and public agencies" would be better than any other and would so include the class which Prof. Lawson treats in the part called "the exceptional bailment." But, as his ideas are embodied in the book and we are only called upon to express our opinion of it as it now exists, we are able to say notwithstanding this preference on our part, that the book is an excellent one and treats the law of bailments from

an American standpoint in a very thorough, conscientious, able manner. The treatment of the law as modified by the necessities of the public in the case of common carriers and other public agencies is up to date. The book is a good one.

GREENLEAF ON EVIDENCE.—A treatise on the law of Evidence by SIMON GREENLEAF, LL. D. In three volumes. Fifteenth edition. Revised, with large additions by Simon Greenleaf Crosswell. Little, Brown & Company, Boston. $12.00 net.

Greenleaf on the law of evidence has been the principal treatise on that branch of the law in the United States since 1842. It has been and is the standard in that branch as Kent and Blackstone are in the Common Law. Starkey and Phillips had written their treatises on evidence, and American Notes had been published with the text, but a necessity existed for a treatise, which should not only set forth the Common Law of evidence, but should especially adopt the same to American ways and classes of business. New modes of travel and transportation has grown up and new branches of industry and modes of communicating thought had come into general use, and the laws enacted relative thereto and the judicial interpretations of the same had to be collated and codified. This Professor Greenleaf did in a thorough and admirable way, and his great work must always be the text book of the student of the law of evidence. As time went on, and the habits, laws and customs changed, and the manner of doing things had changed and progressed, and new interpretations of existing laws had been made by the different courts of the several states, the author and his successors have been obliged to revise and enlarge the work, until it has now reached the fifteenth edition. The great number of cases involving questions of evidence and reported from time to time, has made it necessary to keep pace with the progress of trade, commerce and personal rights, to publish a large number of editions. The last edition has made additions of new cases amounting to about 1900, and including mainly such cases decided and reported since the previous edition, showing the tendency of the courts in new lines of decisions. The subjects which have been affected most materially in the period covered by the new matter of the 15th edition, and which have been treated with more or less fullness in that edition are, real estate, presumptions, the admission of proofs of character and reputation, especially for defendant in criminal cases, the admissibility of statements of pain, suffering etc., the meaning of the term "relevancy" and "*res gestae*", the introduction of proof of collateral facts, shop books or evidence, pleadings, how far evidence, the privileges of attorneys and clients, of doctors and patients, of clergymen and penitents, oral inducements to written contracts, and a very full statement of the statutes and decisions affecting the competency of parties and witnesses, the competency of husband and wife for and against each other, and the competency of persons convicted of

crime as witnesses, and also the principals affecting the introduction of expert testimony and the comparison of hand-writing in evidence. These and the other additions to the work, represent the development of the law since the last edition. Take the treatise as it now exists in the fifteenth edition, it is as complete a commentary on the law of evidence as can be found in any book in this country or Europe. No student of the law, who desires to know the law of evidence of the United States, and who desires at the same time to know the reasons and philosophy of it, can afford to be without the completed edition of Greenleaf on the law of evidence.

RECENT MICHIGAN DECISIONS.

AGENCY—LIABILITY OF AGENTS—NOTICE OF TRIAL—Agents may bind themselves by their contracts, notwithstanding it be known to both parties it is not for their benefit directly, but is for the benefit of another. Having done so, they cannot evade their clearly expressed liability under the contract by showing that they were agents

Where several defendants to an action have appeared and plead to the declaration by an attorney, service of notice of trial upon that attorney is sufficient notice to all, although it appears that two of the defendants subsequently appeared by other attorneys, no order of substitution having been entered. *Landyskowski* v. *Larks et al.* (March 3.)

BILL OF SALE—VENDOR'S RIGHT TO POSSESSION OF PROPERTY—WAIVER—JUDGMENT.—A contract of sale which provides that the title to the property shall remain in the vendor until the purchase price is fully paid, but which contains no provision authorizing the vendor to retake possession in case of default, clearly implies that the right of the vendee to possession is dependent upon his making such payment as provided in the contract, and that, in the event of default and demand, the vendor is entitled to recover possession of the property.

The fact that by agreement between the vendor and vendee, one was put into the store to see that the stock was not unduly reduced, would not be sufficient to show a waiver of the vendor's right to take possession, or an extension of the time of payment.

Section 8342, Howell's Statutes, has no reference to a suit in replevin brought to recover goods on account of a default in payment, the title to which goods, by the contract itself, remained in the vendor until full payment by the vendee. *Ryan* v. *Wayson.* (March 3.)

CHANCERY PRACTICE—RULE 25—PLEA—VERIFICATION—SUFFICIENCY.—Under Chancery rule No. 25, where no replication is filed the truth of the plea is admitted.

It is not necessary to verify a plea which sets up a public record, if the record be that of the court in which the plea is pending.

It is not necessary that a plea to the whole bill should protest that neither all nor any of the matters alleged in the bill are true. The form, "By protestation not confessing or acknowledging the matters and things in and by said bill set forth, etc.," is sufficient.

An objection to a plea filed setting up a former suit in bar, on the ground that it did not assert that the former case was heard on its merits or that the decree was based upon such hearing or that the former decree determined that complainant had no title to the relief sought by his parent bill, or that the answer to the former bill was to the whole of the said bill, was well taken.

It is within the power of the court to grant an amendment to remedy such defect in the plea.

A party cannot, after filing a bill, setting up a transaction, the chief fact of which is the mistake of complainants as to land intended to be conveyed and permitting the same to proceed to final decree, file another bill setting up the same transaction in amplified form, but still requiring the same fact to support the bill; i. e., the averment of mistake. *Detroit, Lansing & Northern Railway* v. *McGammon.* (Feb. 26.)

CONSTITUTIONAL LAW—CONSTITUTIONALITY OF ACT REQUIRING EMERY WHEELS TO BE PROVIDED WITH BLOWERS—Act No. 136 of the Laws of 1887, as amended in 1893 and 1895 (Sec. 1680 Z 1 and Z 2, 3 How. Stat.) providing "that all factories and workshops where emery wheels or emery belts of any description are used, either solid emery, leather, leather covered, felt, canvas, linen, paper, or wheels rolled in emery or corundum, shall be provided with blowers or similar apparatus, which shall be placed over or under said wheels in such a manner as to carry away the dust arising from said emery wheels while in operation, directly to the outside of the

building or some receptacle placed so as to receive the dust, is constitutional and valid. *People* v. *Smith.* (March 3.)

CONTRACT LAW—COMPLETION OF CONTRACT BY BONDSMEN OF SUB-CONTRACTOR—RECOVERY—DECLARATION.—In an action by the bondsmen of a sub-contractor against the principal contractor to recover the amount due under the contract upon the completion of the contract by the bondsmen, the plaintiffs recovered verdict.

Held: 1. That it was not error for the court to refuse to grant a new trial, the disputed items of account between the parties having been fairly submitted to the jury, and it appearing that there was sufficient evidence to warrant the finding of the jury.

2. Under the first count in the declaration the plaintiffs claimed the right to recover as assignees of the estate of the sub-contractor, who died shortly after withdrawing from the contract, an amount alleged the contractor owed such sub-contractor at the time of his decease. Under the fourth count plaintiffs claimed as bondsmen they completed the unfinished contract, and as such are entitled to receive all that would be coming to the sub-contractor.

Held: That the court was not in error in refusing to require the plaintiffs to elect upon which count they would rely. *Rohde* v. *Biggs.* (Feb. 26.)

CRIMINAL LAW—MURDER—CHARGE TO JURY—DYING DECLARATIONS—EVIDENCE—OATH TO OFFICERS IN CHARGE OF JURY.—In a criminal prosecution for murder where the evidence clearly shows that the defendant, if guilty at all, was guilty of murder, the fact that the judge might not have clearly instructed the jury as to the offense of manslaughter becomes immaterial.

The admissibility of a dying declaration cannot depend upon the exigencies of the case, or the fact that it was taken immediately after the injury, nor does its admissibility depend upon notice of the intended taking of such statement, to the defendant or his counsel and it is not within the provision of the statute requiring the names of witnesses to be indorsed upon the information.

Dying declarations are admitted in homocide cases, upon the theory that the belief in impending death is equivalent to the sanction of an oath. They extend to statements of the cause and circumstances of the homocide.

It is not an error for the court to refuse to give a charge as prepared by counsel, where the subject is fairly covered by the court it is sufficient.

A jury should not be instructed in broad terms that if a man is insane he is irresponsible, and should be acquitted of crime. It is for the jury to determine whether he is non compos mentis, or has not control of his mind or will, by reason of disease, and with reference to the act charged.

It was not error for the court to exclude testimony as to the reputation of the deceased, the testimony offered being purely heresay.

Where the jury is given in charge of two officers the better practice is to administer the oath to each. Reversal will not be had for failure to administer the oath to each where it is shown that the defendant was not prejudiced by such omission. *People* v. *Beverly.* (March 3.)

ELECTION LAW—INSPECTORS—INTERPRETER—FRAUD—EFFECT.—Where the inspectors of an election permit one who has been appointed as an interpreter, to give instructions and hold conversation in a foreign language with voters after they have received their ballots and before going to the booths to vote, without being called upon or requested either by the voters or inspectors to give such instructions, the ballots so cast are void and should not be counted.

Where the whole body of electors have been subjected to the possibility of a forbidden influence, and a large portion are shown to have been approached in forbidden ways, under circumstances indicating a fraudulent design, the vote of the entire precinct should be thrown out if the result would thereby be changed. *Attorney General ex rel Harwood* v. *Stillson.* (Feb. 26.)

MECHANIC'S LIEN—ENFORCEMENT OF LIEN ON MACHINERY SOLD TO A LESSEE—PAYMENT BY DRAFT.—Plaintiff sold certain machinery to one engaged in manufacturing on premises of which he had a lease, which machinery was attached to the property and used in the prosecution of the business, after which the lessor took possession under a forfeiture of the lease and claimed the machinery under a provision of the lease which provided that all improvements or additions made by the lessee to the property should at the termination of the lease become the property of the lessor.

Held: That such provision could not interfere with the rights of the plaintiff to

perfect a mechanic's lien under Act No. 179, Public Acts of 1891, as amended by Act. No. 199, Public Acts of 1893, and that such lien would extend to the machinery.

Neither a note or an accepted draft would be payment unless it was intended by the parties to be so. *Marinette Iron Works Company* v. *Cody, et al.* (Feb. 26.)

MUNICIPAL LAW—AUTHORITY OF COUNCIL OF DETROIT TO REQUIRE WATER BOARD TO FURNISH WATER TO HOUSE OF CORRECTION, WITHOUT CHARGE, DENIED.—The Board of Water Commissioners of the City of Detroit is a corporation created by act of the legislature, and given the charge of the water works, which it is authorized to manage, and fix and collect water rates from the owner and occupant of each house or building having or using water.

It cannot be compelled by the Council of the city of Detroit to furnish water, without charge, to the House of Correction, the management and appropriations for which are not within the control of the Council and the expenses of which the Council are not authorized to pay only to the extent that they shall be found to exceed the earnings of the institution.

The cost of supplying water by the Board of Water Commissioners to the consumers thereof, being borne by the consumers, and not by the tax-payers of the city, such other consumers of water cannot be required to contribute pro rata their consumption for the cost of water supplied to the House of Correction. *City of Detroit* v. *Board of Water Commissioners.* (March 3.)

REMOVAL OF TOWNSHIP OFFICIAL—RETURN OF TOWNSHIP BOARD—WHEN CONCLUSIVE.—In a proceeding had under the provisions of Section 5170, Howell's Statutes, relative to the removal from office by township boards of school district officers for certain causes, where the return made by the township clerk states that all the testimony has not been returned, but sets out the acts complained of and that evidence was given which supports the complaint, such evidence will be taken as true and as conclusive as to the facts alleged in it. *Taylor* v. *Schimmel.* [Dec. 24.]

RAILROAD COMPANY—INJURY CAUSED BY DEFECTIVE CAR—RISK INCIDENT TO EMPLOYMENT—CONTRIBUTORY NEGLIGENCE.—Where one in his daily occupation as brakeman, has become familar with the defective condition of certain cars, it must be held that he has assumed the risk incident to such employment.

The evidence showing that plaintiff after having discovered the defective condition of a car to which he was about to attach a coupling, made no effort to stop the train nor took any steps to remedy the defect, he could not recover for an injury received in consequence of such defect. *Secord* v. *Chicago & Michigan Lake Shore Railroad Company.*

SALE—PURCHASE BY ONE INSOLVENT—WHEN NOT FRAUDULENT.—A purchase made by one who is insolvent and who shortly thereafter fails in business cannot be deemed fraudulent in law where it is shown that the vendee purchased in good faith and with intent to pay for the goods. *Illinois Leather Company* v. *Flynn.* [Dec. 30.]

STREET RAILWAY LAW—FAILURE TO SHOW NEGLIGENCE IN RUNNING CARS.—In an action against a street railway for personal injury where the plaintiff fails to show that the car was run in an unusual manner, or that the usual rate of speed was unusual, there is no question of negligence to present to the jury. *Guilloz* v. *Ft. Wayne & Belle Isle Railway Company.*

SUPERVISORS—PROCEEDINGS FOR REMOVING FROM OFFICE—SUFFICIENCY OF CHARGES.—Where the return of the clerk of a board of supervisors in proceedings had for the removal of an official from office, shows that by mutual consent the making of a record of the testimony in the case was dispensed with, the official can not be heard to complain on the ground that the evidence was not returned nor will the court assume that the evidence was insufficient.

While the proceeding for removal is quasi judicial and while the officer is entitled to notice of the charges and such charges must be sufficiently specific to apprise him of what he is to meet, the technical rules of pleading are not to be applied. *Burt, et al.* v. *Board of Supervisors of Iron Cornty.* (March 3.)

CURRENT LITERATURE.

Mr. David A Wells continues his account of taxation in literature and history in Appletons' *Popular Science Monthly* for March, giving methods employed for raising revenue in ancient Greece and Rome. In the department of Legal Miscellany in this number of the Michigan Law Journal will be found two excepts from this interesting article. Under the title The Failure of Scientific Materialism this doctrine is sharply attacked by Prof. Wilhelm Ostwald, of Leipsic, who affirmed that it should be replaced by a theory based on energy. Herbert Spencer contributes to this number a chapter on the Painter in his series on Professional Institutions. Prof. E. W. Hilgard shows that the salts in our alkali lands consist largely of plant food, and tells what means may be used to neutralize the harmful constituants. Exercise as a Remedy is discussed by Henry Ling Taylor, M. D., who shows how potent a curative agent exercise may be when carefully prescribed and how injurious it may be in some cases. Prof. William R. Newbold writes on Normal and Heightened Suggestibility, giving some of his experience with hypnotic patients. James Rodway describes in a bright, chatty manner The Coming of the Rains in Guiana. A scientific examination of the problems of Acclimatization and their bearing on the future of tropical regions is contributed by Prof. William Z. Ripley. Among illustrated articles are an account of an archæologic find by Prof. C. F. Holder under the title The Ancient Islanders of California, and The Story of a Monkey, by M. Dybowski Prof. W. K. Brooks concludes his Study of Inheritance in this number; Prof. M. V. O'Shea contributes a thoughtful paper on Educational Values in the Elementary School, dealing with the question What studies are of most worth? and Gifford Le Clear corrects a misconception as to certain measurements of The Velocity of Electricity. A Sketch and Portrait are given this month of the Ohio scientist William Starling Sullivant, who was acknowledged as the greatest American authority on mosses. The Nature of Liberty and The New Natural History are discussed in the Editor's Table, and the other departments are well filled with scientific brevities.

Littell's Living Age has a special charm of its own. "Made up of every creature's best its contents are "*Various, that the mind of desultory man, studious of change, and pleased with novelty, may be indulged.*"

Questions of gravest present moment from the pens of the ablest known writers; recent discoveries in the realms of science, art and exploration; fiction, poetry, biographical sketches, and contributions from the field of general literature, fill its pages.

The February numbers well attest the versatility and value of this magazine. Taking, almost at random, an article or two from each weekly issue we find "Five Weeks with the Cuban Insurgents," by Hon. H. Howard; "The Venezuela and British Guiana Boundary," by Hugh Robert Mill; "The Advantage of Fiction," by M. G. Tuttiet; "The Sultan and his Priests," by Richard Davey; "The Rule of the Laywoman," by Mrs. Stephen Batson; "Some Seventeenth-Century Matrons and their Housekeeping," by Margaret M. Verney; "American Dislike of England," from the *Spectator;* "The Reign of the Queen," from the *Edinburgh Review;* "The Wild Wa——a Head-hunting Race," by J. George Scott, C. I. E.; "The Seizure of a Turkish Flagship," by Demetrios Bikelas; "The New Photographic Discovery," by Silvanus P. Thompson; "How to Read," by Arnold Haultain, and "Germany Under the Empire," by A. Eubule Evans.

But these only make a dozen or so of the forty-four papers, including fiction, which appear in this one month's issue. This magazine is a weekly, contains sixty-four pages in each number and is published by Littell & Co., Boston.

Among the many monthly magazines that come to our notice, none are more welcome than *The Review of Reviews.* The principal editorial entitled "The Progress of the World", contains all the leading topics of news which have transpired in the

month last past. It not only reviews the important events, but it wisely selects out the most interesting features, those which ought to be remembered, and puts them in such a happy way that they can be easily remembered and referred to, in case they are needed for future use. The auther does not study to embellish nor is he harsh in criticism, or unfair or prejudiced in his manner of stating facts, but his object seems to be to teach his readers in the simplest and fairest way, and at the same time make his selections readable and attractive. He succeeds in doing this, without resorting to anything sensational or in any way appealing to the prejudices or passions of his readers. The *Review* shows in the March number two maps, "South Africa before and after Cecil Rhodes". These maps show at a glance how Great Britain pushes its conquests. It covers the rulers of adjoining territories with the saliva of flattery and blarney, and then like a great snake, it proceeds to swallow them. The article shows how Cecil Rhodes, the cunning agent of Great Britain thought that the Transvaal, or the South African Republic was in the proper condition to be swallowed, but he forgot the courage and good sense of the Boers and their capable president. Mr. Chamberlain, the British Colonial Secretary, came prematurely to the conclusion that the Dutch were bound hand and foot, so that when Dr. Jameson *accidentally?* undertook to execute the well planned and official expedition, the Boers were on the alert, and that planned encroachment, was quickly crushed. This is only one of many instances that illustrates the manner in which England has gained possession of such a large share of the earth. The editor has also shown in this and former numbers, the treatment Venezuela has received from Great Britain. We cannot allude to all the subjects noticed in the leading article, but we advise our readers to read it carefully. Other articles some of which are finely illustrated, are worthy of careful attention Mrs. Helen Campbell's article on household economies is especially good. The author does not so fiercely insist that women shall leave woman's domain and push men out of their legitimate places, but she insists that woman shall be educated to properly attend to the business within her undisputed sphere, to household economies, which means the health and happiness of home and home life, the food, its selection, preparation and consumption, so that health and happiness can be best promoted. There are several other articles in the March number which are of a high order, and none are light and frivolous. If the proprietor keeps up the pace he has set in his last number, the popularity on success of the *Review of Reviews* is a sure thing.

H. S. Pingree

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HAZEN S. PINGREE.

ELI R. SUTTON.

In the *Arena* for March, B. O. Flower says: "Mayor Hazen S. Pingree, of Detroit, Mich., is one of the most remarkable personages in public life. He has had to meet the abuse, the baseless calumny, and the sneers of conventionalism and plutocracy, much as had Abraham Lincoln prior to his first election." From all these assaults Mayor Pingree has escaped, and he is probably the most popular man in the state of Michigan to-day. Pingree was born on a farm, near Denmark, Me., August 30, 1842. His boyhood days knew nothing but toil, hence he has never had the advantages of a collegiate education. He has always been, however, a close observer, and he has picked up a fund of information more valuable than all the classical nonsense a college professor can teach.

While on the farm Pingree had his first lesson in politics. A candidate for the state senate came to the field where the men were harvesting grain. Pingree, boy as he was, was swinging a cradle, and says he well remembers when the politicians came to solicit their votes. "We are all Democrats here," answered one of the men, "except that boy, and he is a black abolitionist." At the age of fourteen he left home and commenced working for one of the big mills, which furnishes hard work and poor pay to the inhabitants of small New England towns. This was the first live corporation Pingree had ever seen, and when the men were marshalled and manipulated, like parts of the machines they worked, by tap of bells; when, after a day of toil the only pleasure afforded was a limited meal at the corporation soup house, he learned his first

lesson in monopoly hating. Is it much wonder that as a man, Pingree should now feel sympathy for the laboring man, whose work is hard, and his pay only sufficient to keep him in condition to work? In Pingree, laboring men feel that they have a friend, one who on account of his actual experience, can sympathize with them.

When the war drum finally awoke the slumbering New England towns, the name of Hazen S. Pingree was the first to be subscribed to the roll of volunteers. In 1864, after a bloody encounter, nearly all of the 1st Mass. Artillery was captured, and Pingree, with thousands of other loyal soldiers, was forced to eke out a miserable existence within the walls of Andersonville.

Since Hazen S. Pingree entered public life as mayor of Detroit, there has probably not been a single issue of any of the Detroit newspapers which has not contained his name, and when sensational suicides have been scarce, the newsboys invariably cry out "All about Mayor Pingree!" It would seem that all this publicity would expose all the traits of one's character, and that the people of Michigan would know Hazen S. Pingree as familiarly as university students know the character of rocks they analyze. If all that has been published were said in the interest of truth, this probably might be true, but no newspaper man in Detroit will deny that the object of a great part of what has been published about Mr. Pingree has been to oppose or advocate reforms proposed by him, and consequently such accounts contain more exaggeration than fact.

Mr. Pingree is essentially a reformer. He has often said that he would resign his office if he could not be doing something. Those who know him best appreciate the truth of this. His first nomination for mayor was literally forced upon him. Detroit had given his predecessor a democratic majority of 4,937, over C. C. Yemans, the republican nominee. It was no tempting offer which the republican convention forced upon Mr. Pingree, but he accepted the nomination and was elected by 2,338 majority. He has been four times re-elected with constantly increasing majorities, and at the last election, his plurality was greater than the total number of votes cast for his opponent. These facts are sufficient to prove that Mr. Pingree must possess some unusual and extraordinary qualities, for since Detroit was incorporated as a city, in the early days of the nation, no one else had ever served as chief executive of the city for more than two terms. What these extraordinary qualities are may be disputed, but the fact is undisputed that the great mass of the

people of our city have unconsciously learned to look to Mayor Pingree for greater political freedom, as the negroes of the South looked to Abraham Lincoln to free them from their slavery.

Before he accepted the nomination for mayor, he had never held a public office. He had always attended caucuses, but he was not known as a politician. He was well known as a successful business man and the slogan of his first campaign was "Vote for the shoemaker prince!" When he was mustered out of service in 1865, he came to Detroit and commenced working for H. P. Baldwin at a salary of $800 per year, but he soon started out in business on his own responsibility, and there are many men now living in Detroit who recall the genial shoemaker working at the lathe, making shoes by hand for the limited number of his customers. Few realized then that at no distant day this same shoemaker would be at the head of the largest shoe manufacturing firm in the west, and that his name would be known to all the citizens of the state. From the smallest beginning, the firm of Pingree and Smith has grown until it now has a capacity of 4,000 pairs of shoes daily. When running a full force they employ over seven hundred men, with a weekly pay roll of over $7,500. The firm pays taxes on an assessed valuation of $330,000, and is worth more to the State of Michigan than all the landed estates held for speculative purposes in the entire state.

When Hazen S. Pingree was elected to the mayoralty, Detroit was corporation ridden, just as the people of Michigan today are corporation ridden. With the poorest street car system to be found anywhere in the United States, the rate of fare was five cents straight, or six tickets for a quarter. Consumers were paying for gas 28½% more than the gas company had any right to charge, under an ordinance which was itself extortionate. The city was lighted by a private plant, and only two streets in the city were respectably paved. Although millions of dollars had been paid out for sewers, the city was a veritable bog, with practically nothing but surface drainage. Grasping corporations had their hands in the city treasury, and kept it depleted, while taxes increased, and poor people became poorer. A transformation has been wrought in all these things, thanks to the disinterested public service of the mayor, and the people of Detroit have never lost an opportunity to express their appreciation, by vote or otherwise. From an overgrown village, Detroit has become metropolitan, during the administration of a single mayor. Outside Detroit the people do not realize the effort these reforms cost. We know now that we have a public lighting

plant and that no private corporation is plundering the city's pockets while we sleep; but we forget that Pingree spent many sleepless nights to secure public lighting. Some have even forgotten that it was Pingree who went to the legislature, and took two special trains full of Detroit citizens with him, to pray to the legislature for the privilege of lighting our own streets, instead of letting it out by contract to a company which was but a limb of a gigantic monopoly. The legislature finally consented to permit the municipality to do its own lighting, but the electric lighting lobby secured the insertion of a provision giving the city the right to contract for lighting for a period of three years. (See Act No. 294, Local Acts 1893.) This provision only transferred the fight from the legislature to the common council, but today our streets are well lighted from a plant owned and operated by the city, and it was only the powerful influence of Mayor Pingree which defeated the right of a private concern to exact tribute from the city under the sanction of contract.

Another triumph greater than this, was when Pingree, almost single handed and alone, compelled the street car companies to sell eight tickets for a quarter. After persuasion had failed, he attacked their franchises in the courts. Pingree always believed that it was the intention of the framers of the constitution of this state to limit the life of a corporate grant to 30 years. He still is of the same opinion, although all the courts in the land have decided otherwise. Section 10 of the constitution provides "No corporation shall be created for a longer time than thirty years." The Detroit city railway company was incorporated in 1862, and was granted the privilege of exacting a straight five-cent fare from passengers. This grant should expire, by constitutional limitation, in 1892, and Pingree's plan was to compel them to vacate the streets, or sell eight tickets for a quarter. In the face of all the newspapers, and even the common council, Pingree clung to this single idea and finally succeeded by establishing a rival company with the most improved equipment in the world. Detroit is now an anomaly in street car matters, as no other city in the world can boast a better street car system with 3 cent fares. A history of the street car litigation in Detroit would fill volumes, and be extremely interesting to the legal profession, for the decisions prove that American lawyers excel the Norman barristers in technical finesse.

On account of some of his utterances Mr. Pingree has been accused of being inimical to our judicial system. On the 27th of March, Joseph H. Vance, law librarian for the State University,

wrote me, "Will Pingree, if elected governor, refuse to leave the courts and our judicial system as they now are, undisturbed?" I answered after consultation with Mr. Pingree, that while Pingree had sometimes criticized judges, he had not attacked the judicial system; that in common with most business men, he believes that our technical common law practice can be simplified, and justice be made easier and less expensive. Pingree, in his anxiety to hasten reform when reform is so necessary, sometimes chafes at the law's delay, but he has never been known to attempt to bring anything about except according to law. Parethetically, I might say, that a majority of Michigan lawyers agree with Pingree that our Michigan practice is too technical, too cumbersome, and our courts bound by precendent and feudal pleadings, more like Dicken's "Circumlocution Office" than courts of justice.

Outside the mayor's office, Mr. Pingree is one of the kindliest of men. I have often heard him enquire after the health of some of his bitterest enemies. He is always ready to extend a helping hand to young men battling with the world. The poor are his chief solicitude, and I fully believe that the "Potato Patch Scheme" was the outcome of an earnest desire to better their condition. It is not a charity; it is rather an opportunity for poor people to earn a livelihood by their own work.

At his elegant home on Woodward Avenue, Mr. Pingree always keeps open house to his friends. Every Sunday he gathers about him men engaged in all sorts of professions, and the library room is a veritable lyceum for debate, in which Mr. Pingree always takes a part. He has decided views upon all questions, but is willing to be convinced by better reasons. Sometimes he takes the other side of a question just to bring out arguments in its favor. Before he entered politics, he spent a great deal of money for masterpieces of art. His drawing room contains a life size "Hamlet and Ophelia" by Hughes Merle, "Going to the Bath" by Bongereau, a "Sunset" by Rousseau, a "Landscape" by Jules Dupre, a marble statute of the "Last Plaeid" by Randolph Rogers, and many rare and valuable selections of high art. Mr. Pingree knows what good art is, and last winter at the art loan exhibition it was he who arranged the paintings so as to receive the best light.

This paper has been drawn out unconscionably, and in no wise does credit to the subject, for Hazen S. Pingree is a many sided man of undoubted sincerity and extraordinary, original force of character.

WHY ABOLISH THE JURY SYSTEM.

WM. D. TOTTEN.

There is nothing more desirable than certainty in a judicial tribunal. While the uncertainty of jury trials is proverbial, and liable to be illogical and absurd, it must be conceded, that it is usually certain and logical. The contrary is the exception to the rule, and not the rule.

There will always be miscarriages of justice in the courts. Judges are only men, and they are often illogical and uncertain. They are not usually so; and, because they often err, is not good excuse for abolishing judges.

Granting that jurors are often misled by lawyers, and their attention frequently diverted from the case, by unjust observations of counsel, still they should not be burdened with the attorney's faults. This can be remedied by the judges themselves, to whom jurors usually look for final guidance in their deliberations. Such unjust observations may be in effect obliterated by the court in confining the counsel to his line of duty, and to the case in hand, and by his charge to the jury.

A step forward in the administration of justice would be, to restrict the labors of counsel to the examination of witnesses before court and jury: to prohibit argument of (question of) fact to the jury: to have the jury find special verdicts on the facts, under the Court's charge: and let the court render such judgment, as the facts so found would warrant.

The elements of uncertainty would then be reduced to the minimum, and the popular judiciary retained.

II.

The trial by jury, under the conditions outlined, would not be necessarily much longer, than before the court without a jury. The arguments on the facts being eliminated, the counsel would naturally confine the testimony to the issues: and, if disinclined to do so, they could be made to do so, under the court's orders.

Business need not be, and is not, in any well conducted court, suspended, while the jury is out. It is a fault of the judge and not

of a jury, when the conditions are to the contrary.

There is no reason why legislation can not be had to restrict new trials before juries as well as courts. But, it is better for suitors to have the liberty of new trials before either tribunal.

III.

The fact, that men are guaranteed a jury trial, is a safeguard to society and a check upon lawlessness and crime. The visible expense of providing such a trial is, in many instances, greater than the amount involved in the suit at bar. And, yet, a greater expense might be incurred, if the same suitors had known that there is a denial of their right to a jury trial. The jury, is the time honored referendum to which the masses of our people instinctively turn, and their confidence in our judicial system is retained for the very reason, that they are through the jury a part of that system. While their suspicions are not well grounded, they prefer to submit their cases usually to the usual twelve, than to the judge; believing, that the class, from whom the judge is selected, is as notorious for quibbling, as it is for administering justice. The expense of the system is not a matter of complaint from the rank and file of tax-payers. It usually comes from the opponents of the jury system, who thereby appeal to the weakness of men to strengthen an ingenious argument.

IV.

Excuses from serving on juries should be limited to cases of sickness or interest in the cause. Every man should be patriotic enough, to devote a part of his time to jury duty. And, the ground of challenge, should be curtailed so as to retain well informed and intelligent men as jurors.

Then ignorance and error would to a great extent, leave the system and much of the uncertainty complained of would be abolished.

V.

The right of trial by jury, was fought for by our revolutionary forefathers, and was enshrined in our constitution deliberately by the best minds of the early republic.

Since, "wealth has accumulated, and men decayed," we have noticed a hue and cry raised by corporations and their representatives more especially against the jury trial. To such, the jury trial is an "inherited burden." Some of their legal rights are morally indefensible and hence, they hate and fear juries. These haters of juries

are usually the jury fixers. They inaugurate rascality secretly, denounce it openly, by charging it to the jury system, and clamor for the one man power of a court. Judges are but human, and while they are usually worthy men, it must be conceded, that there is well grounded fear among the common people, that we are nearing the days, when government by injunction is becoming too common. Abolish the trial by jury, and the restraint of the direct power of the people on the judges would diminish in proportion to the increase of man's disposition to tyrranize.

In dealing with man, it is safest to recognize, that he is a natural tyrant, and that our republican system of checks and balances is the surest thing to keep him from practicing tyranny.

Jury fixing can be abolished by laws prohibiting the separation of the persons drawn as jurors, and by keeping them entirely isolated from the outside world during the progress of a term of court.

Rioters mistake their remedy when they destroy court houses instead of hanging the jury fixers. Riot breeding judges also mistake their office and the temper of the people, when they jail men without jury trials, where the question is one of fact, involving the liberty and reputation of the citizen.

VI.

The necessity for representation of the people in legal tribunals is not as apparent under ours as under a monarchical system. But, this does not signify, that it has outlived its usefulness. By retaining this representation a republican form of government will be best served and least injured, and best preserved to posterity.

Three-fourths of twelve jurors should be sufficient to a verdict.

VII.

We do not concede that there is no need of a jury system in the United States, nor anything analagous to it. As long as man exists there will be tyranny to be apprehended and oppression to be resisted. It matters not what the form of government may be, there will always be a well defined struggle between freedom and tyranny. The sleep of the people is the tyrant's opportunity. Let the people cease to have a representation in the courts, and they will grow to be looked upon with suspicion by the masses. Judge made law has examples where the temper of our people has been put to a severe test. The holding of the Income Tax Law unconstitutional is a fair example. There is much cause for complaint of injustice in many

law and chancery proceedings. Deprive the people of all representation in the jury box, and many fancied grievances would be conjured up. Should the masses of this republic come to lose all confidence in our courts, we would be alarmingly near revolution, disorder, and anarchy.

VIII.

Justice should be dispensed freely to all suitors. If an Ohio statute, savoring of class legislation, requires a man to have a property qualification in effect in order to have the benefit of a jury trial, it should serve as a warning and not be accepted as a precedent. No good principle underlies such an enactment. The rich and the poor alike should have the benefit of jury trial without price or hindrance.

IX.

The existence of machinery in politics, whereby the jury system is weakened, is not cause for the abolition of the system. Legislate to destroy the machine and your system will be safe. It is a confession of weakness or corruption on the part of the bar, when it is assented that jurors are responsible for a large number of petty law suits, ill-will, perjury and contention.

If the bar will do its duty, by admitting to its ranks only those who are fit to engage in its practice, morally or otherwise; exclude therefrom rigidly its shysters and pettifoggers; enforce its laws against subordination of perjury, and frown upon petty and vexatious litigation, the evils last mentioned will largely cease. For it must be remembered, that jurors only determine causes which other officers of the courts permit to come to an issue.

If judges are already found so weak and with so much fear of incurring displeasure that they will set aside no verdicts for fear of displeasing the jury; and are frequently so weak and demoralized, what assurance have we that they would not frequently be weak and demoralized if the sole administration of justice was confided to their care. Admitting this weakness in human nature the degrading spectacle of deciding causes in the interests of classes, or at the beck of the mob and the masses, might be presented, and the depth of the degradation of the law's administration would become perhaps beyond human comprehension.

In those countries where no jury trial exists, whether their form be monarchical or otherwise, we may look for living witnesses of what our own country might become.

If boodlers can find hope, comfort, and mercy from the jury system, it certainly is not the corporation boodler. It can not confiscate our property without an assessment for damages by our fellow citizens; nor can it find anything but cold comfort in attempting to evade payment of public revenues or dealing justly by all the people, when juries pass upon the merits of cases in which it seeks to avoid and evade the laws. The fact, that this class of boodlers is excepted from the favor of a jury, ought to justify its existence.

But, if boodlers escape the penalties of the law, it is very certain that jurors are not alone to blame. Weak, incompetent, and sometimes corrupt prosecuting officers and sheriffs, are more to blame; and any judge who would fear the displeasure of a jury on setting aside its verdict, might as consistently fear the ill-will of the boodlers, especially, if by their influence or votes he held, or might in future hold his official position and draw its salary.

Public attention is not usually directly drawn toward the officers of the court other than jurors; and with one voice the jurors are blamed and made the scape goats for the sins of others.

The fact, that professional jurors exist in some localities is the fault of the court and bar that tolerates their existence.

Honest effort to administer justice can best be aided by the retention of the jury system.

SOME JUDGES.

Of the great men who have adorned the English bench, worn the collar of S. Simplicius (?),[1] or sat in the marble chair "over against the midst of the marble table," at the upper end of the great hall of William Rufus, many have been distinguished no less as statesmen, soldiers, and ecclesiastics, than as leaders of that profession which Hooker has been pleased to describe as the "mother of peace and joy." Odo, the first chief justiciar, officiated by turns at mass in the royal chapel, as supreme judge in the king's court, and in command of troops employed in putting down insurrection.

Among early luminaries one fell fighting valiantly at the siege of Acre; another, from whose corpse Wallace ordered as much skin to be taken as would make a sword-belt, died a soldier's death on the banks of the Forth; Scrope, chancellor to Richard II., was engaged at Crecy and Neville's Cross; C. J. Fortescue fought by the side of Morton, afterwards Archbishop of Canterbury, on the blood-stained field of Towton; and even as late as 1685 the infamous Jeffreys set out on his Western Circuit armed, not only with a commission of Oyer and Terminer, but also with authority to command the forces in chief. The language of these ancient sages smacked somewhat of association with camps, if at least one may judge from what is recorded of John de Mowbray (*temp.* Edward III.), who called aloud from the bench to the Bishop of Chester, a defendant in an action tried before him," "Allez au grand diable."

Before the days of Mary, the judges rode to Westminster Hall on mules, and Mr. Justice Whyddon, in the opening year of her reign, was the first to bestride a horse in the solemn procession. In 1673, however, Judge Twisden, to the great consternation of his brethren, "from want of gravity in the beast and too much in the rider," was "laid along in the dirt" on a like occasion, since which time these cavalcades of mounted lawyers have come to an end. Riding, however, till superseded by driving, remained the only way of going Circuit, for professional prejudice ran strongly against pedestrian circuiteers, and many good stories have been told of great

1. The origin of the collar of S. S. is much in dispute.

lawyers who in those early years when

Slow rises worth by poverty deprest,

found it difficult to raise funds for the purchase of a horse.

In days more recent Mr. Justice Byles, well known for his work on *Bills*, was accustomed when at the bar to take a ride every afternoon. The sorry appearance of his steed, however, roused the mirth of the Temple, and the horse was generally called *Bills*, to afford opportunity for the alliterative combination, "There goes Byles on Bills;" if, however, report speaks true, the animal was known to master and clerk under another name, and when a too curious client inquired the serjeant's whereabouts, the reply was given with clear conscience that he was "out on *business*."[2]

A good story is told of Byles after he was raised to the bench. The judge was one day trying a man for stealing, when a medical witness was called, who stated that in his opinion the prisoner was suffering from kleptomania, "And your lordship of course knows what that is." "Yes," said Byles quietly; "it is a disease which I am sent here to cure."

Prisoners, it has been said, think much of the rank of those who pass sentence of death upon them, and the sheep-stealer of bygone days preferred that his doom should proceed from the lips of a chief justice. Lord Campbell mentions a case where a serjeant presided on the Oxford Circuit in place of the judge taken suddenly ill, and a man was capitally convicted. Being asked as usual whether he had anything to say, he replied, "Yes, I wish to say that I have been tried before a journeyman judge."

Buller, who wore ermine at thirty-two, and whose idea of heaven was to sit at *Nisi Prius* all day and play whist all night, was once going the Oxford circuit, and was asked when met by the sheriff whether he was a bona fide judge (the functionary made one word only of fide), as they had been so often fobbed off with serjeants in those parts. Satisfied on this head, the sheriff ventured to pursue his inquires, and asked whether at the last place visited he had been to see the elephant. "Why no, Mr. High Sheriff, I cannot say I did, for a little difficulty occured: we both came into town in form, with trumpets sounding, and a question arose as to which of us should visit first." It was Buller who decided that a husband might chasten his wife with a stick no thicker than his thumb, and his portrait by Gillray as Judge Thumb for a long time adorned the print-shops. Some wearers of the ermine have been specially pop-

2. A Generation of Judges, p. 79.

ular with the criminals. "Who is the Judge of 'Soize" asked Sykes, offered his choice between sessions next week and assizes a month hence. "Baron Cleasby," said the clerk. "Oh, then I'll go to 'Soize," rejoined the criminal; "Cleasleby is the judge for me."[1]

Speaking of sheriffs recalls the fact that it was only the other day that guards of policemen, paid out of country rates, were substituted for bands of javelin men equipped by those officials; and it may not be generally known that the sheriff of Northumberland at one time furnished a special escort with the judges who rode across the wild border country from Newcastle to Carlisle, a regular receipt being given by the sheriff of Cumberland when their bodies were delivered to him. The corporation of Newcastle, down to a period comparatively recent, used to present the judges with a sum of money to defray the additional expenses of this journey, and Lord Denman was the last to receive it in the form of a gold jacobus. The chief justice had several of these coins, which he kept and used as whist counters.

Lawyers are prone to punning. Perhaps one of the best legal puns is attributed to Lord Chelmsford when, as Sir F. Thesiger, he objected to the mode of examination of an opponent's witnesses. "I have a right," maintained his antagonist, to *deal* with my witnesses as I please." "You may *deal* as you like, but you shan't *lead*," was the reply. Chelmsford it was, by the by, who, walking down St. James' Street one day, was thus accosted: "Mr. Birch, I believe?" "If you believe that, sir, you will believe anything," replied the ex-chancellor as he passed on. Even the sedate Blackstone, in his commentaries, remarks with much gravity that landmarks on the sea-shore are often of signal service to navigation; and the saying of Chief Justice Wright, when visiting Magdalen College, Oxford, to the president (Hough): "Sir, you must not think to *huff* us," is well known. Richardson (1635), going the Western Circuit, had a great flint flung at his head one day by a condemned criminal, which luckily did him no worse harm than to knock off his hat. "You see now," said he to some friends who congratulated him on his fortunate escape, "if I had been an *upright* judge then had I been slain." He was, in fact, leaning low upon his elbow at the time, and so escaped. Bradshaw, it is said, fearing violence on the king's trial, had, besides other defences, a thick, big-crowned beaver hat, lined with plated steel, to ward off blows. The hat is still preserved in the Ashmolean Museum in memory of the day:—

1. A Generation of Judges, p. 57.

When England's monarch once uncovered sat,
And Bradshaw bullied in a broad-brimmed hat.

Chief Justice Cattlin (1571), from whom the Spencers, Russells, and many of the greatest English families are descended, when sentencing a prisoner convicted as a go-between in the correspondence between Mary of Scotland and the Bishop of Ross, thus addressed him: "The good seedsman hath sowed in you good gifts, but, as it is said in the Gospel, then came the enemy and he sowed darnel, cockle, and noisome weeds. Such wicked seedsmen have been in England. If they had sown the right seed for their own use, *the seed of hemp, and felt of it*, then had they received according to their deserving, *hemp*, meet seed for such seedsmen."

In violent and abusive terms Jeffreys thus passed sentence on the saintly Baxter: "This is an old rogue, a hypocritical villain who hates the liturgy, and would have naught but long-winded cant without a book;" whereupon, suddenly turning up his eyes, the judge clasped his hands and began to sing loudly through his nose, in imitation of what he supposed to be the prisoner's mode of praying. Jeffreys drank as he swore, like a trooper. "My lord," said King Charles significantly, as he took from his own finger the bloodstone ring which he gave him, "as it is a hot summer and you are going Circuit, I desire you will not drink too much." Of eight hundred and forty-one prisoners spared after Monmouth's rebellion and transported, many were sold on his account, and he calculated that after all charges paid they would average £15 a head. Edward Prideaux paid him £15,000 for his liberation, with which he purchased an estate, subsequently known in the vulgar tongue as Aceldama, the field of blood. After Jeffreys had been many years in his grave, his granddaughter, travelling the western road, was so grossly reviled by the pleasantry that she durst not venture to proceed to the scenes of the Bloody Assize. A contemporary of Jeffreys was the odious Scroggs, whose name, uttered by angry nurses, has aroused the terror of generations of English children.

One of the briefest yet not least emphatic of sentences was passed by Baron Martin on a hoary-headed sinner convicted many times of felony; "You are an old villain, and you'll just take ten years' penal servitude." The remark of Lord Rames, a Scotch judge, to Matthew Hay cannot be said to err on the side of overmuch sympathy. The trial was just concluded, and the prisoner, with whom the judge had been in the habit of playing chess, had been found guilty of murder at Ayr, 1780, when his lordship ex-

claimed as the verdict of the jury was returned: "That's checkmate for you, Matthew! "

Some judges have enjoyed an unfortunate reputation as hanging judges, and one of the most repulsive specimens, Sir Francis Page, has been thus handed down to posterity in these lines of Pope:—

> Slander or poison, dread from Delia's rage,
> Hard words or hanging, if your judge be Page.

He lived to be an octogenarian, and in his later days replied in answer to an inquiry as to his health, "My dear sir, you see how it fares with me: I just manage to keep *hanging on, hanging on.*" Lord Ellenborough (the first judge to remove from the neighborhood of Russell Square to the West-end) was considered somewhat severe in disposing of criminal cases. One day at an assize dinner, he was offered some fowl; his lordship intended to try beef. "I'm sure you'll like it my lord," said Jekyll (afterwards master of the rolls); "it is *well hung* beef."

Jekyll, by the way, bequeathed £20,000 to found a sinking fund for payment of the National Debt, on which it was remarked that he might as well have tried to dam up the middle arch of Blackfriars Bridge with his full-bottomed wig. It was Mansfield who thus characterized this patriotic legacy, of whom we are told that he one day directed a jury to find a stolen trinket of less value than forty shillings, that the thief might escape the capital sentence; the jeweller, however, demurred, saying that the fashion alone cost him twice the money. With solemn gravity the judge replied, "As we ourselves stand in need of mercy, gentlemen, let us not hang a man for fashion's sake." The testy judge has been most effectually laughed down by Dickens's caricature of Gaselee's peculiarities of manner under the punning sobriquet of Mr. Justice Stareleigh.

In marked contrast stands out the matchless good temper of Baron Graham, of whom it was said that "no one but his sempstress could ruffle him." It was customary in his day to suspend judgment in criminal cases till the close of the assizes, and then deliver the sentences all in a lump. A man had been accidentally omitted in the list of capital punishments, of which he was reminded on coming to the end—"Oh yes, I see, John Thomson; John Thomson, I beg your pardon; you also are to be hanged by the neck until you are dead, and may the Almighty have mercy on *your* miserable soul also." Hardwick's courtesy was one day pointedly shown when he observed Cromwell's grandson standing in Westminster Hall listening to the Great Protector being vilified; instantly the judge rebuked the speaker, saying: "I observe Mr. Crom-

well standing outside the bar and inconveniently pressed by the crowd; please to make way for him that he may sit by me on the bench."

It has been cited as a remarkable proof of the reverence of the English people for the law, that during the Great Rebellion, judges went circuit, and gaols were delivered as in a time of profound peace. But in the confusion which followed the death of the king it was different, and on the 31st of January, 1649, Westminster Hall was in a state of dire perplexity, no fewer than six of the twelve judges refusing to sit again. Nothing daunted by a difficulty so unforseen, Cromwell announced that if he could not rule by red gowns he would rule by red coats. During the Protectorate royalist practioners took their revenge by refusing to write Oliver with a capital O and many nibbled the toast floating at the top of the cup that they might mutter as they drank, "God send this *crumb well* down." One of the Commonwealth judges, Oliver St. John, was sent as ambassador to the Hague, where, however, he met with anything but an enthusiastic reception; a son of the queen of Bohemia publicly called him a rogue and a dog, and the Duke of York struggling with him which should first pass through a turnstile, snatched off his hat and flung it in his face, exclaiming the while, "Learn, parricide, to respect the brother of your king;" to which the judge calmly replied: "I regard neither you nor the person of whom you speak but as a race of fugitives."

St. John not only gave his daughter away, but according to the then existing law, performed the nuptial ceremony which made her a wife.

Erskine, by the by, when quartered in Minorca read prayers and preached as a subaltern in the First Royals; Mansfield wrote a sermon for his friend Bishop Johnson, too suddenly called on to officiate on a Thanksgiving Day in the Abbey, and in our own time Lush was in the habit of occupying the pulpit in a Baptist chapel on Sundays.

Two Commonwealth judges going the Western Circuit met with what might easily have proved a more disagreeable adventure at Salisbury, when (1655) Penruddock suddenly captured the city. Some of his followers actually seized the judges in court, requiring them to order the sheriff to proclaim Charles II.; they refused, however, and were all but hanged. Penruddock himself afterwards suffered, and his dying words are well worthy of being recorded. Pious as brave, he exclaimed as he ascended the scaffold: "This may, I hope, prove Jacob's ladder, for though the feet of it rest on earth, yet I doubt none but the top of it reacheth unto heaven."

Lord Shaftesbury in the reign of Charles II.—the last judge who was not previously a regularly trained lawyer—rather astonished the profession by the dress he wore when seated in the marble chair "an ash-colored gown, silver laced and full ribboned pantaloons displayed without any black in his garb." Sitting in court in the dog days, Lord Norbury once selected for its coolness a dress which he had worn at a masquerade ball of Lady Castlereagh's; oppressed by the stifling atmostphere and forgetful of his inner raiment, the judge threw back his judicial robe just as he was pronouncing sentence of death upon a gang of prisoners, his solemn accents contrasting painfully with the strange garishness of his costume. In our own day Baron Martin finding the heat exceedingly great on a summer circuit, divested himself of wig and robes, and even then feeling the cushion of the chair uncomfortably warm, replaced it by a soap box. Campbell having on one occasion to speak sixteen hours, obtained permission (upon condition that it was not to be drawn into a precedent) to remove his wig, a distinctive ornament of the English barrister introduced from Paris by the lawyers of the Restoration.

Though "Apollo and Littleton seldom lodge in the same brain," it is a great mistake to suppose that a deep study of the law extinguishes all other tastes—that

> Where once such fairies dance, no grass doth ever grow.

Literature has often solaced the leisure hours of lawyers. To Warham Erasmus dedicated his "S. Jerome;" Wolsey was a patron of letters; Hatton was a dramatic author; Clarendon wrote the "Rebellion;" Somers, poetry; North, biography; Harcourt was the friend of Prior, Gay, Arbuthnot, and Pope; Thurlow associated with Cowper, Crabbe, and Johnson; Eldon was an Oxford essayist; Erskine wrote a novel, and more recently Denman, Talfourd, Campbell, and Brougham have made for themselves a reputation in the walks of literature. Mansfield writhed under a false quantity. "My lord," said a Scotch advocate, "I have the honor to appear as counsel for the curators." "Curators, Mr. Crosby, curators!" groaned the judge. "I do wish our countryman would pay a little more attention to prosody." "My lord," readily replied the advocate, "I can assure you our countrymen are very proud of your lordship as the greatest senator and orator of the present time."

A counsel before Baron Alderson, moving to enter a *nolle prosequi* on the last day of term, pronounced the *e* long. "Pray, sir," said the judge, "remember that this is the last day of term, and don't

make thing's unnecessarily long." Errors in pronunciation serve to recall the fact that Sir George Jessel encountered occasional difficulties with the letter *h*. He was one day examining a French witness through an interpreter as to the characteristics of a very poisonous chemical compound. "And what if you eat it," said Jessel. "Si vous le mangez, Mon Dieu; ce n'est pas pour manger;" and it was some time before he could induce the interpreter to inquire what would happen "Si vous l'echauffez."

Manifold have been the forms of recreation indulged in by distinguised lawyers. Dyer (1580), we are assured, when ruffled by any annoyance in the discharge of his duties sought solace by playing upon the virginals; Fitzjames kept up an old college friendship with Wolsey when he was a simple country parson near Yeovil, and was actually engaged in the brawl at the fair, when his reverence got drunk and was by and by set in the stocks by Sir Amyas Paulet. Erskine was a great lover of animals; a favorite dog attended him to all his consultations when at the bar; a pet goose followed him as he walked about his grounds, and two leeches, which had been applied to him when he was once dangerously ill, called Home and Cline, after the names of two celebrated surgeons, were kept in a glass bowl and exhibited to his particular friends.

Stowell gloried in Punch and Judy; Camden, who had an undignified habit of gartering up his stockings while counsel were most strenuous in their eloquence, loved cider and novels; Wickens amused his leisure by bookbinding; Jessel catalogued fungusses, while Maule was singularly apt in picking locks with a piece of wire, an art which he had acquired by the frequent loss of his keys when at the bar. Baron Martin's sporting proclivities were well known. "Don't be hard on me, my lord," said a prisoner to him one day; perhaps your lordship will accept a beautiful gamecock which I have at home." The judge hid his mouth with hand, in order to conceal a smile, and passed a not very severe sentence, adding: "But mind, you must not send me that gamecock." Tenterden, on the other hand, strongly discountenanced sporting cases. "We," said Brougham, appearing before him in an action to recover the amount of a wager on a dog-fight, "were minded that the dogs should fight." "Then I," replied the chief justice, "am minded to hear no more of it. Call the next case."

Good living—occasionally perhaps too good—has not been unappreciated by many occupants of the bench. "A dinner lubricates business," said Stowell, whose favorite dish was beafsteak and

oyster pie, as Eldon's was liver and bacon. Thurlow was very fanciful about his fruit, and being dissatisfied on one occasion, caused the whole of a very fine dessert to be flung out of the window upon the Marine Parade, Brighton; and Ellenborough is supposed to have been once influenced in a judgment, concerning sailors employed in the lobster-fishery being privileged from the press-gang, by his love of lobster sauce with turbot. Ellenborough, by the way, as a volunteer, could never get out of the awkward squad, nor understand with which leg to step off on the word "march," even though the sergeant with the aid of a lump of chalk essayed to teach him the difference between the right and left foot.

A very good story is told of the loss of his lordship's wig. Lady Ellenborough, a renowned beauty, on one occasion accompanied the judge on circuit, on the distinct understanding that she should not encumber the carriage with bandboxes—his abhorrence. During the first day's journey Lord Ellenborough, stretching his legs, chanced to strike his foot against something under the seat. It was a bandbox. Down went the window and out it flew. The coachman, thinking the box had fallen out, at once pulled up, but his master furiously roared out the order to "drive on." On reaching the next assize town, Lord Ellenborough proceeded to equip himself for the bench. "Now," said he "where is my wig?" "My lord," replied the attendant, "it was thrown out of the carriage window."

When Lord Northington was chancellor, he requested the king's permission to discontinue evening sittings in his court in order that he might finish his bottle of port in peace; but ere he died he paid the penalty which port so often exacts from its votaries, and suffered

> Pangs arthritic that infest the toe
> Of libertine excess

—pangs which Eldon declared he did not so much mind below the knee, provided they were *ne plus ultra*. Stowell and his brother Eldon were in the habit of dining together, the first day of term, at a tavern near the Temple, and in later life the former recalled these dinners to his son-in-law, who observed, "You drank some wine together, I have no doubt?" "Yes," was the reply, "we drank some wine." "Two bottles, perhaps?" "More than that." "What, three bottles?" "More." "Why, sir, you don't mean to say that you took four bottles?" I mean to say that we had more, and now don't ask any more questions." Sound was the dictum of Chief Baron Thomson, who replied to the barrister who observed that after a good dinner a certain quantity of wine does no harm, "True,

sir, it is the *uncertain* quantity that does the mischief."

In marked contrast to the majority of the judges of the Georgian period, Lord Kenyon was very mean; all the year round it was Lent in his kitchen and Passion week in his parlor; his spits, it was said, were always bright, for nothing ever turned on them; and when the income tax was imposed, Lord Ellenborough said that Kenyon, who was far from nice in his habits, intended in consequence to lay down his pocket handkerchief. It was rumered, indeed, that he never had but one, which he had found in the pocket of a second-hand waistcoat which he had bought of Lord Stormont's valet the first time he had occasion to attend a levee. His shoes were frequently much patched, and one day a question as to the quality of shoes supplied being tried before him, the judge suddenly inquired of a witness, "Were the shoes anything like these?" exhibiting his own. "No, no, my lord, better and more genteeler." Kenyon joined heartily in the laugh evoked.

His fondness for introducing supposed classical quotations was so inveterate that George III. one day at a levee advised him to stick to his good law and leave off his bad Latin; advice, however, which he could never be induced to follow. He is reputed to have thus with solemn pathos on one occasion addressed a deeply edified grand jury, "And now, gentlemen, having discharged your conscience, you may return to your homes in peace with full assurance of duty well performed, and as you lay your heads on your pillows you may apply to yourselves the words of the ancient philosopher, *aut Cæsar aut nullus.*"[1]

In a blasphemy case he is stated to have thus thrown light upon the subject: "Above all, gentlemen, I cite to you the Emperor Julian, so celebrated for every Christian virtue that he was called Julian the Apostle."

Here are samples of his favorite utterances: "In advancing to a conclusion on this matter I am resolved 'stare super antiquas vias';" "we will look into the act with eagle's eyes and compare one clause with another 'noscitur a sociis';" "it is as plain as the nose upon your face, nevertheless 'latet anguis in herba.'" Small wonder that the judge, seeing one day the learned Dr. Parr in his court, interrupted a serjeant who practised before him with the excuse, "We don't talk the best Latin in these courts, brother."

To several other judges also has been ascribed the address to a dishonest butler convicted of stealing wine from his master's cellars,

1. Coleridge's Table Talk.

that he had for years been accustomed to feather his nest from his master's bottles.

Kenyon even studied economy in the hatchment put up on his house after his death. The motto was found to be *Mors janua vita*, at first supposed to have been a mistake of the painter. "Mistake!" exclaimed Ellenborough when he heard of it, "there is no mistake about it; the testator left explicit directions that the estate should not be burdened with the expense of a diphthong." And this serves to remind one of the story of the Irish peer who attributed his rise to the reputation he acquired by reporting Mansfield's decisions, and took for his motto *Per varios casus*, as another successful barrister on setting up his carriage assumed *Causes produce effects*, much after the manner of *Quid rides*, suggested by Curran for the prosperous tobacconist.

"A much speaking judge," says Lord Bacon, "is no well tuned cymbal," and justice has occasionally suffered somewhat in loss of dignity arising from collisions between bench and bar. A sharp sparring match took place one day between an Irish judge Robinson and a Mr. Hoare, whom the former had charged with the design of bringing the king's commission into contempt. "No, my lord," said the counsel, "I have read that when a peasant in Charles I.'s time found the king's crown in a bush he showed it reverence: but I will go further and respect it even on a bramble." There is a celebrated reply of Dunning to a remark of Lord Mansfield. "Oh, I if that be law, Mr. Dunning, I may burn my law books!" "Better read them, my lord," was the sarcastic rejoinder. Poor Sir James Mansfield was so disturbed by the unseemly behavior of the bar that he used to be heard crying aloud in his dreams, "Damn the serjeants."

We pride ourselves, and justly, on the purity of our judges, but there have been startling exceptions, and we may well congratulate ourselves that judicial corruption is a thing of the past, and an impossibility at the present. In Edward I.'s time wholesale corruption disgraced the bench, and Chief Justice Weyland was in consequence banished walking bareheaded and with bare feet, with a crucifix in his hand, down to Dover to embark. Not every judge could decline a gift so gracefully as Sir Thomas More. When a wealthy widow who had obtained from him a decree, presented him on New Year's Day with a pair of gloves and forty pounds in angels in them, he emptied the money into her lap, telling her that "it was against good manners to forsake a gentlewoman's New Year's gift; so he would take her gloves but refuse the lining."

Hale carried his dread of bribery to a length that exposed him to ridicule. A gentleman in a western county was in the habit of sending a buck to the judges, and did so when Hale came circuit, though he was plaintiff in an action set down for trial. The cause being called, Hale insisted upon first paying for the buck, despite the plaintiff's protests that he was only following the custom of his ancestors, who had never sold their venison. "That," said the judge, "is nothing to me. Scripture saith, a gift perverteth the ways of judgment. Let my butler count down the value of this venison." Plaintiff thereupon withdrew his record, indignantly refusing to become a butcher.

The jingle of the benchers' table describing three degrees of comparison in a lawyer's progress is not wholly void of truth; getting on, getting onner (honor), and getting onnest (honest).

It has been freqnently remarked that the profession of the law is one of the ties serving to connect the middle and lower ranks of English society with the aristocracy. The first Howard was a successful lawyer, so also was the first Cavendish. The Duke of Manchester also derives his title from a chief justice of the time of Henry VIII., and it has been stated that more than eighty peerages have been founded by the legal profession.[1] Saunders, from an errand-boy in Clement's Lane, became a chief justics, Lord-Chancellor King's father was a grocer at Exeter, Ryder was son of a mercer at Smithfield, Stowell and Eldon were sone of provincial tradesmen, and Rolt was for four years a draper's assistant in Oxford Street. Pemberton, himself a "gaol-bird," tried Lord Russell and was counsel for the seven bishops. Popham, the judge before whom Guy Fawkes was tried, was at one time a highwayman, and there is a strange story that he became owner of Littlecote, Wilts, as a reward for allowing Wild Dayrell to escape on his trial for the atrocious murder which forms the subject of the ballad in "Rokeby," "The Friar of Orders Grey."

Holt (1689), in his Oxford days, was not above taking purses, and long afterwards, when going circuit as a judge, he one day recognized a man capitally convicted before him as an old accomplice, and having visited him in gaol, asked after the rest of the gang, and received for answer, "Ah, my lord, they are all hanged but me and your lordship."

The story of Charles Abbot has been often told—the scrubby little boy, who, failing to become a chorister, ran after his father through the streets of Canterbury, carrying a pewter basin, case of

razors, and a bag of hair powder. The unpretentious dwelling whence the pair emerged was situated in a narrow street opposite the stately west portal of the cathedral, and its owner, who shaved for a penny and cut hair for twopence, boasted that he had thrice prepared his Grace the archbishop to deliver his triennial charge to the clergy of the diocese.

A good story is told of Lord Tenterden, as this disappointed little choirboy became, having one day, at his own table, asked a county magistrate if he would take venison, "Thank you, my lord, boiled chicken," was the reply. His lordship had contracted an inveterate habit of keeping himself and everybody else to the precise matter in hand. "That, sir," said the judge, "is no answer to my question. I now ask you again if you will take venison, and I will trouble you to say yes or no without further prevarication."

Tenterden was habitually down on witnesses, and on one occasion told the chairman of the East India Company, whom he had failed to recognize as he entered the box, "to hold up his head and speak out like a man." The ruling passion is sometimes strong in death, and just "ere the weary pulse of life at last stood still" Lord Tenterden was heard to murmer to himself, "And now, gentlemen of the jury, I leave you to consider of your verdict."

And this brings to mind, in conclusion, that death has, with appalling abruptness, removed some of our judges even as they sat upon the judgment seat. Talfourd (1854), as he was urging the grand jury at Stafford to think *with* and *for* the poor; Watson (1860), just as he had concluded his discharge in the court-house at Welshpool; and Wightman (1863), suddenly striken with apoplexy while in the discharge of his duties at the assizes at York. In remoter days, Chief Justice Hyde (1663), while apparantly in the enjoyment of perfect health, dropped down as he was taking his seat, and in the reign of James II., a chief justice died no less suddenly as he was receiving the sacrament in the chapel of Lincoln's Inn.—*Temple Bar.*

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NOTES.

With this number the MICHIGAN LAW JOURNAL presents to its readers a sketch of the public life of a remarkable man. Mr. Pingree has advanced from a position and name almost unknown in his own city to a place where his every action is of moment to the whole state. Through his aggressive policy as mayor of Detroit; through his utter fearlessness as a public official; for the enemies he has made; through his clever scheme for the amelioration of the condition of the poor; his ready sympathy for the trials of poverty which in his earlier life made him suffer; for his army record; and for the improved condition of affairs in Detroit, he has gained the respect of a majority of the men in the city, for which he has done so much, the love of many and the hatred of not a few: His determined aggressive hearing could not but offend some.

In this article Mr. Sutton, one of Mr. Pingree's warmest friends writes an interesting account of the mayor as a man and as a public official.

It is an interesting thought to compare Mr. Pingree's start in politics with that of the present colonial secretary of Great Britain, the Honorable Joseph Chamberlain. Both came into prominence before the public in a limited field of action as mayor, one of Manchester, the other of Detroit; the energy of both was remarkable, their reforms fundamental and far reaching. Mr. Chamberlain is a mayor of the past, Mr. Pingree a mayor of the present. Will the future see in the advancement of the latter a repetition of the fortune of the former? Will Mr. Pingree advance along in the line of national affairs as did Mr. Chamberlain, whose mayoralty career was so nearly parallel to that of the former?

Attention is called to the coming meeting of the State Bar Association. It is to be held in Grand Rapids on May 13th and 14th

and subjects of unusual interest are to be discussed. The committee on "Legislation and Law Reform" make a report and advocate changes which will come up for the action of the association. The changes proposed are important and varied and ought to arouse at the meeting discussions of considerable interest to the whole state bar.

Attention has been called to the proposed changes in the regulation of postal rates and now another phase of the same snbject is receiving the consideration of the house committee on Post-offices and Post-roads. It is a bill introduced by Mr. Morse entitled "A bill to equalize the postage on monthly publications when admitted to be carried as second-class matter, and reads as follows: *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the passage of this Act monthly publications, and other publications less often than weekly publications, when admitted as second-class matter under the postal laws of the United States and deposited in letter-carrier post-offices, shall be charged at the same rate and no more than is now charged under existing law for the carriage of weekly publications admitted as second-class matter. And in no case shall a higher rate be charged such publications when delivered in a post-office nearest to the office of publication than is charged for transmission to the most distant post-offices in the United States.

The object of this bill is to repeal the following Act of Congress of March 3, 1879, relating to second-class mail matter:

"The rate of postage on newspapers, excepting weeklies, and periodicals not exceeding two ounces in weight, when the same are deposited in a letter-carrier office for delivery by its carriers, shall be uniform at one cent each; periodicals weighing more than two ounces shall be subject, when delivered by such carriers, to a postage of two cents each, and these rates shall be prepaid by stamps affixed."

One of the glaring injustices of this latter act is this: Publishers can mail papers for free delivery at any point in the United States, except at the home office of the publication at one cent per lb., but for delivery at the home office of the publication, the postage rate for publications weighing less than 2 ounces per copy, is at least eight cents per lb. In other words a Detroit monthly publications if weighing less than two ounces per copy costs from eight to thirty-two cents per lb. for delivering in Detroit, and only one cent per lb. if delivered at the street address of any individual iu San Francisco, Boston, New York or New Orleans. This evil would be remedied. The bill ought to become a law.

LEGAL MISCELLANY.

The first actual transfer of land at Chicago under the Torrens system was made a few days ago, and affords an opportunity for comparison of the old and the new way. Under the former mode there would have been a charge of $25 to $100 for examination of title, lawyers' fees to pay, a risk of flaw in the title would also have existed, and to guard against this, many purchasers would have had the title guaranteed by a company which insures such risks. Under the Torrens plan, the purchaser paid $3 to the county treasurer for having the transfer entered on the books, and the State guaranteed the title. The previous outlay on the part of the seller was $15 for examination of title, $6 for the indemnity fund held by the State, and $2 for the certificate.—*Albany Law Times.*

SLANDER—DISHONOR OF CHECK—BANKS.—The case of Suenden v. State Bank, 65 N. W. Rep. 1086, decided by the Supreme Court of Minnesota, presents an unusual question in the law of slander. It is held that when a banker has in his hands funds of a depositor for the purpose of paying the depositor's checks and the depositor is a trader or merchant, and his check is dishonored by the banker, and returned to the payee, for the alleged reason that he has not sufficient funds of the maker in his hands to pay the same, when he in fact has, it amounts to a slander of the merchant or trader in his business, and he is entitled to recover general compensatory damages in an action against the banker. The court says:

"It is held by the authorities that in such a case the plaintiff's recovery is not limited to nominal damages, but he is entitled to recover general compensatory damages. *Rolin* v. *Steward*, *14 C. B. 595; Schaffner* v. *Ehrman* (*Ill. Sup.*), *28 N. E. Rep. 917; Bank* v. *Goos* (*Neb.*), *58 N. W. Rep. 84; Patterson* v. *Bank*, *130 Pa. St. 419, 18 Atl. Rep. 632; 3 Am. & Eng. Enc. Law*, *225; 1 Suth. Dam.* (*2d Ed.*) § *77*. The case of *Patterson* v. *Bank*, *supra*, seems to place the right to recover more than nominal damages in such a case on the ground of public policy, but the other cases place it rather on the ground that the wrongful act of the banker in refusing to honor the check imputes insolvency, dishonesty, or bad faith to the drawer of the check, and has the effect of slandering the trader in his business. We are of the opinion that the recovery of more than nominal damages can, on sound principle, be sustained on the latter ground, where the drawer of the check is a merchant or trader. To refuse to honor his check is a most effectual way of slandering him in his

trade, and it is well settled that to impute insolvency to a merchant is actionable *per se*, and general damages may be recovered for such a slander. *Townsh. Sland. & L. (4th Ed.) 191*; *Odger, Sland. & L. (2d Ed. 80)*. Respondent's position that an action of tort cannot be maintained in such a case as this, and that plaintiff's only remedy is an action on contract, in which only nominal damages can be recovered, is not sustained by the authorities. The case of *Marzetti* v. *Williams, 1 Barn. & Adol. 415*, cited by him, was an action in tort. The amount of the verdict is not reported, but it is very evident that it was only for a nominal amount, and the only question before the court was whether or not the defendant was entitled to a nonsuit because the action should have been brought on contract not in tort. The court held against the defendant on that point, and what is said beyond this is merely *obiter*, and was so regarded in the subsequent case of *Rolin* v. *Steward*. In *Prehn* v. *Bank, L. R. 5 Exch. 92*, the only question was whether plaintiffs were entitled to recover of the bank certain sums which they had paid to save their credit by procuring money elsewhere to pay bills drawn by them on the bank, and to prevent the bills from going to protest after the bank had notified them that it would not pay these bills, although it had funds in its hands for that purpose. It was held that they could recover the full sum so paid by them to preserve their credit, and the authority of *Rolin* v. *Steward* was expressly recognized. The case of *Brooke* v. *Bank, 69 Hun, 202, 23 N. Y. Supp. 802*, was an action by the receiver of an insolvent whose check had been wrongfully dishonored by the bank. The plaintiff was forced to concede that he could not maintain an action of tort, or recover any damages but such special damages as he alleged and could prove in an action for breach of a contract. These are all the cases cited which have any bearing on the case. These are the only questions raised worthy of consideration. It necessarily follows from the foregoing conclusions that the order appealed from must be reversed."

OBSTRUCTION OF VIEW IN THEATRES.—Sec. 1. *Be it enacted by the General Assembly of the State of Ohio*, That any owner, lessee, proprietor or manager of any theater, hall, opera house, or any such building where theatrical or other performances are given, when any admission fee is charged, who permits or suffers any person attending such performance to wear upon his or her head any hat, bonnet, or covering for the head, which may obstruct the view of any person or persons during the performance in such theater, hall, opera house or building where such performance is given, shall be guilty of a misdemeanor, shall upon conviction be fined not more than ten nor less than two dollars.

The foregoing has become a law in Ohio.

BOOK REVIEWS.

BLACK ON INTERPRETATION OF LAWS—Handbook on the Construction and Interpretation of the Laws. By HENRY CAMPBELL BLACK, M. A., author of "Black's Law Dictionary," and of "Treatises on Judgments, Tax Titles, Constitutional Law, Etc." St. Paul: West Publishing Co. One vol., 8vo., 499 pp. $3.75.

This is the eleventh volume of the "Hornbook Series," and follows the excellent arrangement and typographical style and methodical arrangement which have characterized the preceding volumes of the series. Mr. Black is too well known as a law writer to make further comments upon the author necessary. His law dictionary has made for him a very enviable reputation. He states very tersely in a brief preface the intent and scope of his work. The text is divided into seventeen chapters. The first treats of the nature and office of interpretation. The next chapter is devoted to the construction of constitutions. The author than takes up the subject of statutory constructions, treating in separate chapters, general principles, presumptions, words and phrases, intrinsic aids, and extrinsic aids in statutory constuction. He then treats of interpretation with reference to the common law, of retrospective interpretation, and of the construction of provisos, exceptions and saving clauses. Then follows a valuable chapter upon strict and liberal construction. The next four chapters are upon mandatory and directory provisions, amendatory and amended acts, construction of codes and revised statutes, and declaratory statutes. He then considers the rule of *stare decisis* as applied to statutory construction, and concludes with a lucid and quite exhaustive consideration of the interpretation of judicial decisions and the doctrine of precedents. The work throughout shows discrimination and pains taking effort. Mr. Black is to be congratulated upon his latest achievement.

STATE LIBRARY BULLETIN—Sixth Annual Comparative Summary and Index of Legislation by States in 1895 arranged and published by the University of the State of New York. Albany: paper covered, 310 pp., 35 cents.

This book is hardly a new departure in the law book field, for it is the sixth volume from the same source along the same general lines, but we believe the first of these did start a scheme wholly original. From year to year as the successive numbers have ap-

peared there has been a steadily increasing demand for them and appreciation of them and now the system of summarization has developed into such a form, and the result is a book of such a valuable character that we do not wonder at the demand which has arisen for copies of it. One useful feature of this present volume and a departure from the form of previous volumes is a separate table of constitutional amendments arranged by states and showing the result on all amendments during 1894 and 1895, and giving also all those to be submitted to future vote. Although following the general lines of previous years the index of subjects is a little enlarged and the number of topics increased. It is not a book necessary or even of great use to the general practitioner, but to the lawyer who aims at the wider knowledge and the broad view of the law which such knowledge affords it will be highly prized.

RECENT MICHIGAN DECISIONS.

ADVERSE POSSESSION—USER—DEDICATION.—The city of Detroit claimed title to a strip of land, as being part of Miami avenue, which adjoined complainant's lot and had been fenced in and occupied by her for the past fifty years. In 1881 complainant removed the fence in compliance with a resolution of the common council directing property owners to remove all fences in front of their premises in Miami avenue. It was asserted by defendant that complainant, by acquiescing in the order of the council was now estopped from claiming title by adverse possession.

Held:—That there being no evidence that complainant intended to dedicate the strip to the city, or of any act on the part of the city except to order the removal of the fence, the city had acquired no title to the strip by user. *Leonard* v. *City of Detroit.* (March 11.)

ATTACHMENT—LUMBER NOT PERISHABLE PROPERTY.—Lumber and shingles are not perishable property within the meaning of Section 8011, Howell's Statutes authorizing a circuit judge to order a sale of perishable property taken in attachment proceedings. *Mosher* v. *Bay Circuit Judge.* (March 11.)

ATTACHMENT—JOINT DEBTORS—AFFIDAVIT—DISSOLUTION.—Where a joint indebtedness and joint act are alleged in an affidavit for attachment a joint act and indebtedness must be proved; when the plaintiff desires to rely upon several acts by each of the joint debtors, he must so allege in his affidavit or fail to maintain his case.

Inasmuch as the tranfer or concealment of joint property necessarily includes the transfer of the property of one of the debtors, a denial by him that he has transferred his property or any portion thereof necessarily includes the denial of any joint transfer. *Cottrell* v. *Hathaway.* (March 24.)

CRIMINAL LAW—RAPE—EVIDENCE—INSTRUCTION TO JURY.—In prosecution for assault with intent to rape, the prosecutor, in his opening statement, offered to show that the respondent on several occasions prior to the time of the commission of the offense charged had committed similar acts. The offer was objected to and the objection sustained.

Held:—Not reversible error.

Where the charge of the court in its entirety is a fair statement of the law applicable to the case, reversal will not be granted for the reason that certain portions of the charge, standing alone, might tend to mislead the jury.

Respondent cannot be heard to object on the ground that the judge instructed the jury that he was certainly guilty of assault and battery; and that the only question for them to decide was whether or not he was guilty of the more serious offense, counsel for respondent having stated to the jury that respondent was probably guilty of assault and battery and that it would not take them long to convict of that offense. *People* v. *Ricketts.* (March 11.)

CONSTITUTIONAL LAW—MUNICIPAL BONDS—ELECTION—VALIDITY OF ISSUE.—A statute authorizing a municipality to issue bonds for the purchase of a city market containing a proviso "unless the qualified electors of said city, voting in their respective wards, shall have authorized the issuing of said bonds by a majority of their votes cast at any regular election, or at a special election called for the purpose of voting upon such question," must be construed as meaning that a majority of all the votes cast at the election must control and not a majority of the votes cast upon the question of bonding. *Stebbins et el.* v. *Judge of Superior Court of Grand Rapids.* (March 24.)

CRIMINAL LAW—MURDER—JURORS—ASSISTANT PROSECUTOR—TESTIMONY OF PHYSICIAN—PROOF OF PREVIOUS ACTS.—A challenge to a juror on the ground that he had served in the regular panel within a year, should be allowed.

When a juror is challenged on the ground that his name did not appear upon any assessment role in the county and that he was not taxpayer in the county, the challenge should be sustained.

It was not error to excuse a juror for cause who stated that he had talked with a member of the coroner's jury who told the facts in the case as he understood them and that he had talked with many others, and had been told that poison had been found in the stomach of the deceased, and had believed it to be true, the fact that poison was found in the stomach of the deceased being one of the most important things in the case for the people to establish.

It was not error for the court to excuse a juror, in the absence of counsel for defendant, on the ground that his business would suffer if he were compelled to serve as juror.

An attorney is not disqualified from acting as prosecutor for the reason that he is a non-resident of the county in which he is employed to act.

A practicing physician, who has read the books and had the benefit of instructors until his mind is so well trained that he is able to take his degree as an M. D. and who is authorized by law to practice medicine, and to prescribe remedies for persons who have been poisoned, either by accident or by design, is competent to express his opinion as to whether a given case is one of poisoning or not; it is not necessary that in addition to the above qualifications, he must have had actual experience in poisoning cases before he can testify.

In a prosecution for murder for causing the death of the deceased, the wife of respondent, by administering poison, there being evidence tending to show that respondent had administered poison to his wife, it was competent as bearing upon his motive or intent in administering the poison, to show that at about the same time he was giving poison to the sister of the wife, who was also an inmate of the household.

It was, however, error for the court to instruct the jury that they might consider this testimony for the purpose of establishing whether the respondent in fact administered poison. *People* v. *Thacker.* (March 24.)

ESTOPPEL—RECOGNITION OF CORPORATE EXISTENCE—RESCISSION OF CONTRACT.—Where an association is recognized by the public authorities as a duly organized corporation, and has done business and filed its annual reports as such, a creditor who has dealt with it as a corporation cannot attack its corporate existence and hold its stockholders liable as partners.

A party cannot affirm such parts of a contract as will inure to its benefit, and rescind that part which is disadvantageous. The rescission must be entire; the contract cannot be treated as valid for one purpose and void for another. *Gow, et al.* v. *the Collin and Parker Lumber Company.* (March 31.)

FRAUDULENT CONVEYANCE—EVIDENCE.—Plaintiff sold certain property to defendant for which he agreed to pay a certain sum in cash and all evidence of indebtedness in the way of promissory notes which he had ever had of plaintiff. Defendant paid the cash and represented that he had turned over all the notes, but in fact kept one back which he had previously sold to a stranger.

Held:—That in an action for a breach of the contract, plaintiff could recover the value of such note. *Reed* v. *Reed.* (Feb. 26.)

HIGHWAYS—DUTY OF PERSON DRIVING ON HIGHWAY—DECLARATION—EVIDENCE.—When no objection has been made to the sufficiency of a declaration either in the Justice or Circuit Court, it can not be raised in the Appellate Court.

In an action to recover damages for injuries received by reason of the alleged reckless driving of defendant, in that while plaintiff was driving south in the east track of the highway, the defendant who was driving north in the west track, deliberately drove across the highway, thus causing the accident, it was not error to admit testimony as to the feeling the defendant had toward the plaintiff before and continuing up to the collision and what he said about the collision.

Whenever any persons shall meet each other on a bridge or road, traveled by carriages or other vehicles, each person shall seasonably drive his vehicle to the right of the middle of the traveled part of such bridge or road, so that the respective vehicles may pass each other without interference. *Tyler* v. *Nelson.* (March 31.)

INSURANCE—MUTUAL BENEFIT ASSOCIATION—ASSESSMENT—NOTIFICATION TO MEMBER.—Where the amount of an assessment payable upon the death of a member of a

Mutual Benefit Association is fixed absolutely by the articles of association, and the duty to make the assessment to meet the death losses is clearly defined by the articles, the levying of the assessment is purely a ministerial act.

An action taken by a board of trustees by which an assessment was ordered by a minority of the members would be ratified by the adoption by the board, at a subsequent meeting, when a majority were present, of the acts of the previous meeting. Such ratification would be retroactive and would take effect from the time the assessment was ordered by the minority.

The articles of the defendant company prescribed that if an assessment was not paid "within fifteen days after the date of such notification," then a second notice shall be given, and if not paid "within fifteen days after the second notice," then the member's name shall be erased from the roll.

Held:—That the evident design of this provision was to give the member full thirty days notice to pay the assessment, a member having received the full thirty days notice could not complain because the second notice was sent a day too early. *Wolf* v. *Michigan Masonic Mutual Benefit Association.* (March 24.)

PRACTICE—ISSUANCE OF WRIT OF CERTIORARI.—Writ of Mandamus or Certiorari will not be granted to review the action of trial courts in refusal to quash an indictment returned by a grand jury. *People* v. *Thompson.* (March 11.)

REAL ESTATE—FORCIBLE ENTRY—RIGHTS OF PARTY IN PEACEABLE POSSESSION.—Where one is in possession of premises peaceably, equity will not interfere to assist a party who obtains possession of the same by force. *De Sale* v. *Millard, et al.* (March 11.)

WILL—UNDUE INFLUENCE—MONOMANIA—EXPERT TESTIMONY—EVIDENCE—In an action brought to test the validity of a will to which numerous codicils had been executed, the case having been tried upon the theory that the execution of a codicil is a re-execution of the entire will, the point cannot be raised upon appeal that the will might be valid although the invalidity of the codicils be established. Cases will be reviewed by the appellate courts upon the points and theories presented to the nisi prius courts.

Unjust and unnatural provisions of a will, together with the evidence of the mental capacity of the testator, can be considered by the jury in determining whether or not undue influence was exercised.

2. An objection was made to an inquiry propounded to a witness on the ground that it was "incompetent, and that any inquiry as to the mental soundness or unsoundness of the testator must be confined to the time the will was made and the codicils."

Held:—That under this objection counsel could only complain of the second reason for their objection. The objection that it was incompetent is too indefinite.

3. The better practice in putting hypothetical questions is to first introduce all the evidence to support the assumed facts stated in the supposed hypothetical question. If, however, after the close of the testimony, it be found that such question contains assumed facts, which there is no evidence to support, opposing counsel should move to have the answer stricken and excluded from the consideration of the jury.

It was not error to allow a witness called as an expert to testify as to his opinion of the ability of the testator to comprehend the moral obligations resting upon him with regard to his children.

4. It was not error for the court to refuse to instruct the jury that the expert testimony in the case was uncertain and unreliable and that but little weight should be given to it.

5. A witness was called as an expert in French idiom and as an interpreter of a French phrase which was used by the testator toward some of his children when he sent them from home. On cross-examination he was allowed to answer a question as to whether he would use the expression toward his own children.

Held:—Not error.

6. Where it is shown that a testator was laboring under partial insanity or monomania and that his will was the direct offspring of such monomania the will executed under such conditions would be invalid, even though the general capacity of the testator to do ordinary business is unimpeached, provided such monomania so affects the testator in the making of his will as to show him of unsound mind in that particular. *Rivard* v. *Rivard.* (March 31.)

CURRENT LITERATURE.

The *North American Review* for April is a very interesting number. Its leading article is one entitled "Great Britain and the United States—Their True Relation," by David A. Wells. The article is an interesting one but in our humble opinion it ought not to have headed a magazine whose prejudices and ideas are so strongly American. It is written by an American whose education was had at Williams College and also at the Lawrence Scientific School of Harvard. He has been in both general government and New York state government employ, and yet this article is thoroughly un-American, It is an arraignment of the United States government before the bar of reason and prejudice charged with selfishness, dishonesty and incompetency. It is moreover a defense of England's action in the gradual usurpation of control over so great a portion of the earth's surface. It is a defense based on the theory, "the end justifies the means." One would think the ideas eminated from the mind of an Englishman blinded and biased by a hatred of republican government. Here is a short quotation: "It is also well to recall that England never did a meaner thing in respect to the acquisition of territory than did the United States in 1848, when, under a claim of might and a higher civilization she robbed, without justification, and at 'one fell swoop' poor Mexico of more than one-half of all its territory." Though this be true it ought not to be spoken so loudly by an American.

"Possible Complications of the Cuban Question" are thoughtfully discussed by Mr. Mayo W. Hazeltine. Mr. Hazeltine's speculations as to the international alliances which might result from a declaration of war by Spain against the United States are ingenious and interesting, especially in so far as they relate to the probable attitude of England toward America in such an event.

Professor Frederick Starr, whose work in the department of anthropology in the University of Chicago is well known, contributes a most entertaining paper on "Pygmy Races of Men"—a subject which has of late attracted considerable attention on both sides of the Atlantic.

The anniversary of the death of President Lincoln being so close at hand, Mr. Seaton Munroe's "Recollections of Lincoln's Assassination" have a peculiar timeliness Mr. Munroe was born in Washington, D. C., and graduated from St. John's College, Annapolis, Md. During the civil war he assumed the practice of the law, having graduated from the Harvard Law School. In 1873-5 he served in the U. S. Navy, as Secretary to Admiral Case, who commanded the naval force on the European station. His description of the events of the night of the 14th of April are remarkably clear and graphic.

The fourth instalment of "The Future Life and the Condition of Man Therein," by the Right Hon. W. E. Gladstone, is given in this number, and deals with speculations on the future of the righteous and of the unrighteous.

Under the title of "Problems of the Transvaal," the many perplexing complications which surround that important South African Republic are ably treated by Karl Blind.

The active and widespread revival of gold mining, which is directing so much attention toward the mountain land of Colorado, is made the subject of an interesting article by T. A. Rickard, who vividly portrays the situation as regards "Gold Mining Activity in Colorado."

Always to the writer the "Progress of the World" as portrayed and sketched by the clever *Review of Reviews* is of more interest than the accounts of the daily papers however exciting and well written.

The editorial pages for May are especially strong in their treatment of current foreign affairs and international topics. The Cuban war and its relations to Spanish

politics, the boundary difficulty between Brazil and French Guiana, other South American matters, the present status of Canadian politics, American policy toward Turkey, the Soudan expedition, England's position among the Powers with reference to Egypt, the British alliance with Italy, Russian interest in Abyssinia, the rising in Matabeleland, and the Budapest Exposition, are subjects which fall within the month's survey and which are intelligently discussed.

In its department of "Current History in Caricature," it pays a tribute to the abilities of Baron De Grimm, the cartoonist, whose death was announced April 16. The *Review* reproduces several of De Grimm's recent drawings, with a portrait of the artist.

David A. Wells, an American whose un-American ideas have been spoken of in a review of "The North American Review" is the author of the leading article for the month of April in Appletons' *Popular Science Monthly*. Here the writer's knowledge is strongly in evidence and we can not but feel pleased with the result. It is on the subject "Principles of Taxation" and American matters are fortunately not discussed.

"The Practical results of Bacteriological Researches" "Tropical Fruit Trees"; "War and Civilization," "The X Rays," "Acclimatization," "The Savage Origin of Tatooing" and several other very interesting articles make up a number of 52 pages.

A rather clever story complete in the one number introduces us to the contents of the April *Atlantic Monthly*. This story is called "The Old Things" and is from the pen of Henry James. "China and the Western World," "Old Time Sugar Making" an interesting article on "The Alaska Boundary Line" with several other good articles fill out an interesting number.

Littel's Living Age has given during the past month many interesting articles in the four numbers which go to make up each month's issue.

Public Opinion comes with its news of the week boiled down to what is to be history. With great discriminating taste the best thought of the best minds in the country on all important topics is here placed side by side. *Public Opinion* is hereby labeled "O. K."

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CONTRACTS OF SALE OF MERCHANDISE. FRAUD ON VENDOR.

HON. LEVI T. GRIFFIN.

LEGAL FRAUD.

This is an interesting topic to every jobbing house, and to every attorney concerned with mercantile collections. The law is pretty well settled on the general subject and the Treatises on Sales are plentiful. Among the best is that of Mr. Benjamin. Tiffany on Sales of the Hornbrook Series recently issued assumes also to state briefly the principles which control in these cases. At large commercial and metropolitan points, and among lawyers who have occasion to often deal with this question, there is perhaps not much difficulty in arriving at correct conclusions, and promptly enforcing the rights of a defrauded vendor client. In more restricted localities where questions of this character arise less frequently, and the test authorities are not always accessible, a review of some of the principal points involved may be of interest, and useful.

Perhaps the most important point at present in dispute may be stated thus;

Will a false representation by the buyer honestly made, without knowledge of its falsity and believed to be true, enable the vendor to avoid a sale, the other necessary requisites for this purpose being present?

This doctrine was clearly laid down in 1844 in *Collins* v. *Evans, 5 Adolphus & Ellis, p 804,* by the Court of Queen's Bench, in an opinion delivered by Lord Chief Justice Denman. It is there said

that the allegation in the declaration that defendant knew the representation to be false, and of which there was no proof, is immaterial. That one of two persons has suffered by the conduct of the other, and the sufferer is wholly free from blame, but the party who causes his loss though charged with neither fraud nor negligence has been guilty of some fault when he made a false representation; that he was not bound to make any statement, nor justified in making any which he did not know to be true; he should therefore abide the consequences of his misconduct.

This decision seems to be so just and sensible in a civil case that it is surprising that it did not become established law, whatever may have been the previous current of authority. It is certain that it cannot apply to a charge of fraud in a criminal case where there must be a fraudulent intent to constitute a criminal offense. It is difficult however to see why, if a false statement is made by one party to another, inducing the latter to act, and who thus suffers damage, he should not be made whole by the party causing the loss. It is a course of conduct to which the law ought to attach the consequence of paying such damage as the false statement has occasioned, and indeed it may be said that there is a slight degree of what may be called moral delinquency.

See observations of Lopes L. J. in Peek v. Derry, 37 Chancery Division 585.

The term "legal fraud" has been somewhat criticised as we shall see hereafter, but the courts, and even eminent judges are not ordinarily guilty of such precision of language as to afford good grounds for it.

It is true however that this case went to the Exchequer Chamber on error from the Queen's Bench and was reversed the same year —*Evans* v. *Collins, same volume p. 820.* The Court in an opinion delivered by Tindal C. J. follows the early case of *Pasley* v. *Freeman, 3 T. R. 51* and declares that the current of authority from that case downwards, has laid down the general rule of law to be that fraud must concur with the false statement in order to give a ground of action; that this doctrine has been upheld by many cases of later date, referred to in the argument and has been contradicted so far as the court is aware, by none; there can be no action therefore for fraud founded upon a false representation unless the party making it knows it to be false, and especially if he believes it to be true. *Haycraft* v. *Creasy, 2 East 92.*

In *Weir* v. *Bell L. R. 3 Exch. Div. p. 238,* decided in 1878 on

appeal from the judgment of the Exchequer Division, Bramwell L. J. criticises the use of the words "legal fraud" and substantially holds that there must be moral fraud to make a man liable for fraud —"I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well founded complaint of legal fraud, or of anything else except where some duty is shown and correlative right, and some violation of that duty and right. And when these exist it is much better that they should be stated and acted on, than that recourse should be had to a phrase illogical and unmeaning with the consequent uncertainty."

There is ground for saying that the Lord Justice is making too much of words. As long as the meaning of the words "legal fraud" is well understood in the profession it is hardly worth discussing whether some other words may not be more acceptable. The learned Lord Justice suggests none, unless made into a complete sentence.

It is very clear that "legal fraud" means fraud in contemplation of law, and as observed by Mr. Justice Campbell, *infra*, "these actions are not brought to teach moral lessons, but to redress actual grievances."

The question is very elaborately discussed with extended citations of the English authorities in *Joliffe* v. *Baker*, *11 Q. B. Div.*, *225*, decided in 1883, in which the conclusion is reached that there is no such thing as "legal" fraud in the absence of moral fraud; and that a representation believed to be true does not afford a ground of action.

But these cases are much shaken and severely damaged by the later case of *Peek* v. *Derry*, *37 Ch'y Div.*, *541;* decided in 1887, wherein Colton, L. J. and Sir J. Hannen and Lopes, L. J. all comment on "legal fraud:" Lord Justice Colton referring to the observations of Lord Bramwell appearing above, disclaims entering into any discussion as to whether legal fraud is a happy expression and suggests that it is not one which he should adopt, but he continues; "The question is whether there is not a duty on the part of those who make statements to be acted upon by others, and whether there is not a right in these persons to whom the statements are made. In my opinion there is a duty," p. 567. So also Sir J. Hannen; "I apprehend it to be the rule of law, that if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must in a civil point of view,

be held as responsible as if they had asserted that which they knew to be untrue," p. 581.

The observations of Lopes, L. J. seem to indicate that there is no fraud when there is no moral delinquency, but that there is some slight moral delinquency in making a representation for another to act upon which the party making it does not know to be true, and that it is sufficient to render such a representation fraudulent in contemplation of law; and he adds; "This is what I understand by the expression which is so often used in the authorities, and which has been referred to by Sir James Hannen; I mean the expression "legal fraud."

These observations of the learned Justices of the Chancery Division seem to indicate a drifting back close on to the borders of the opinion of the Queen's Bench. The remark of Lopes, L. J. is quite in accord with that of Lord Chief Justice Denman, *Supra*— that a party who causes a loss though charged with neither fraud nor negligence must have been guilty of some fault when he made a false representation.

This question must be regarded as settled in Michigan. Mr. Justice Cooley, the learned author of Constitutional Limitations, speaking from the Supreme Bench in *Converse* v. *Blumrich*, *14 Mich.*, *108* (*1866*); observes that the courts must look at the effect of untrue statements upon the person to whom they are made, rather than to the corrupt motives of the one making them; and that if one obtains the property of another, by means of untrue statements, though in ignorance of their falsity, he must be held responsible as for a legal fraud.

The question has not so often arisen in case of fraud on the vendor, as of fraud on the vendee. See *Ripley* v. *Case*, *86 Mich.*, *261*, yet in *Mooney* v. *Davis*, where the vendor sought to retain the goods purchased, the court distinctly holds that neither the concealment or representation need be wilful or intended in order to constitute the fraud that will vitiate the contract.

In other cases the observations of the learned Justices indicate that the accepted doctrine is as stated by Mr. Justice Cooley, *Stone* v. *Covell*, *29 Mich.*, *359* is an action on the case for fraud in making false representations. Mr. Justice Campbell happily remarks that these actions are not brought to teach moral lessons, but to redress actual grievances. When a person sells his property upon the positive statements of another on facts, and those facts turn out to be falsely asserted, he is damaged by the falsehood, and the false

assertion has all the effect of actual fraud.

In that case however the trial court only held the defendant liable, if he knew or had reason to know or believe, the representation to be false; without requiring proof of actual knowledge.

In *Beebe* v. *Knapp*, *28 Mich.*, *52*, often cited in support of the doctrine the trial judge in his instructions to the jury held the defendant liable only in case of an evil intent—if he intended to deceive the party; but not liable if he made the representations in the honest believe that they were true.

See also *Carter* v. *Glass*, *44 Mich.*, *154*, where Judge Cooley refers to the case of *Beebe* v. *Knapp* as supporting the actionable character of false representations made by the vendor, though the vendor was not aware of the falsity of the representations when he made them; but that case shows as already stated, that the trial court instructed the jury that there must be an intent to deceive. Can such an intent be inferred merely from the falsity of representations not known to be such at the time of making them? Such an intent is conclusively presumed if the representations are known to be false. *Hudnut* v. *Gardner*, *59 Mich.*, *341*.

In *Heineman* v. *Steiger* the defendant denied any wrong intent, but it appeared that a statement made by him was untrue, and that was held sufficient, 54 Mich., 232. In Hudnut v. Gardner, *supra*, the defendant had knowledge of the falsity of the representation. It is quite apparent that the doctrine laid down by Judge Cooley in Converse v. Blumrich, *supra*, is the accepted law of Michigan, and will be enforced in all cases when applicable.

The question can hardly be said to be settled in the Federal Courts. The case of *Southern Developement Co,* v. *Silva*, *125 U. S.*, *247*, decided in 1887, seems to support the doctrine that there must be knowledge of the falsity of the representations to constitute fraud. The transaction involved the sale of a mine and the facts were somewhat peculiar, and the action was in equity.

In an earlier case of *Turner* v. *Ward* involving a sale of personal property, where the question is distinctly raised, it is held in an opinion delivered by Chief Justice Waite that the representations were sufficient to set aside the sale as induced by false representations, although the defendant had himself been deceived as to the pecuniary condition of the firm and made the representations honestly and in the belief that they were true.

This case though decided in 1876 is only recently reported in Appendix 154 U. S., 618, 14 S. C. R., 1179.

Perhaps the weight of authority is against the Michigan doctrine, but it would seem that the tendency of later decisions is in its favor as supported by the better reasoning. It certainly ought to secure a firm lodgement in those jurisdictions where the question has not been already decided adversely.

JOHN JAY AND OTHER CHIEF JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

L. B. PROCTOR OF THE NEW YORK BAR.

To the bar of the State of New York, whose history is the pride of all its members, the nation is indebted for the first chief-justice of its Supreme Court and for a succession of eminent and learned associate judges, from its organization down to the present time.

The most important and delicate duty that devolved on Washington, after the organization of the Federal Supreme Court, was the appointment of a chief-justice. After a careful consideration of the eminent lawyers and jurists of the time, John Jay, of New York, was selected for that exalted position.

"His earliest studies, the judicial character of his mind, his familiarity with the principles underlying American institutions, combined with the experience acquired while presiding over the highest tribunal of the Empire State, peculiarly prepared him to discharge the duties of the chief-justice of the nation."

Jay was appointed chief-justice of the New York Supreme Court May 8, 1777, and was commissioned by the Council of Appointment Oct. 17, 1777. Robert R. Livingston, Jay's early law partner, was commissioned to preside over the Court of Chancery on the same day.

Jay occupied the office of chief-justice of the Supreme Court until December, 1779, when he resigned, having been appointed one of the five delegates from this state to the Congress of the Confederation, and Richard Morris succeeded him.

The act of Congress establishing the Federal Supreme Court was signed in the autumn of 1789, and Jay was the same day nominated its chief-justice, with his associates, Cushing, Wilson, Blair, Iredel and Thomas Johnson.

In transmitting to him his commission, Washington, in a delightful letter, sustaining the allegation of a great English writer that "Letters have souls," said: "It gives me singular pleasure to address you as the head of that great department which must be considered the keystone of our political fabric."

The single name of intellect, by which Plato so appropriately denominated Aristotle, may, with propriety, be applied to John Jay, for he was intellect in strongest, purest sense, with full mastery of all its powers. As Webster said: "When the spotless ermine of the judicial robe fell on John Jay, it touched nothing less spotless than itself."

Before taking his seat on the bench of the Federal Court a curious and animated discussion arose concerning the habiliments of its judges while on the bench. By some the scholarly gown was preferred; others advocated the classic toga; others desired the more sacred stole. But it was the question of the English judicial wig, which is associated with Blackstone, Bacon, Coke, Mansfield, Buller and other English judges, over which the most exciting controversy arose. To the use of this appendage Jay most emphatically objected. The subject was discussed dehors judicial circles. Hamilton, then secretary of the treasury, who favored the methods, costumes and fashions of England, strongly sustained, not only the judicial wig, but the toga; while Jefferson, "whose simple manners and opposition to the aristocratic tendencies of the federal leader exhibited themselves in the combing of his hair out of the fashionable pigtail, discarding hair powder, wearing pantaloons instead of breeches, fastening his shoes with strings instead of elaborate buckles," indulged in denunciations of all unnecessary apparel for the judges. He said to Hamilton one day, when the subject was under discussion: "I have been reading your letter to Jay concerning the apparel of the judges of the Supreme Court."

"Well, what do you think of it?"

"That I have no patience with the prevailing custom of imitating everything English in our democratic institutions, particularly in the organization of our courts. If we must have peculiar garbs for the judges, I think the gown is the most appropriate. But, for heaven's sake, discard the monstrous wig, which makes the English judges look like rats peeping through bunches of oakum," was the reply.

When Aaron Burr was asked his opinion in regard to the attire of the judges, he said: "It has long been the custom in all civilized nations to place the outer garb of Roman Senators, Grecian orators and jurists on modern judges, eminent scholars and divines. But I have never seen or read of a flowing English wig on a statue of an illustrious Roman or Grecian orator or statesman. I am in favor of giving our judges the judicial robes of Mansfield, copied from those

of Cicero. But let us forego the great inverted woolsack, termed a wig, which disguised the majestic head of the great English jurist."

The matter was finally compromised by adopting the gown, or official robe of the high judicial officers of England, in which Jay is made to appear in his portrait that embellishes the rooms of the New York State Bar Association and the Court of Appeals of the State at Albany.

Federal Hall in the city of New York had the honor of being the place where John Jay held his first court. On February 1, 1790, in that old, historic hall, he and two of his associate-judges met. As none of the other associate-judges appeared, there was no quorum and they adjourned until the next day, February 2, and on that day the court, after the reading of letters patent, commissioning the several judges, appointed a crier and other court officers. The next day the clerk took his oath, seals of the Supreme Court were selected, and the first business transacted was the entering of orders for the admission of attorneys and counselors. Many were admitted to practice, among whom were Egbert Benson, Alexander Hamilton, Aaron Burr, Fisher Ames, Robert Morris and Edward Livingston.

At a term of the Federal Court, held in the City of New York, April 4, 1790, Jay delivered his first charge as a federal judge to the grand jury. At this time he was forty-four years of age. In person he was nearly six feet in height, sparely, but elegantly formed. His eyes were blue, penetrating and expressive; his nose of the Roman form. His mouth, which, when closed, assumed a firm and rather severe expression, was softened by the eloquence that fell from it. His hair, which he combed over his forehead, was tied behind in the queue, fashionable at that time, and lightly powdered. His dress was black and faultless. His manner was dignified, yet gentle and unassuming. Though not a voluble conversationalist, he was interesting and instructive, and always pleasing because he was an admirable listener.

We have spoken of the habiliments of judges at that time; the lawyers always appeared in court without robes or gowns, but in full suit of black, with variegated queues, tight small clothes, buckles and ruffles. "The 'lean and slippered pantaloon' was not then in esse as Shakespeare imagined it in posse," and it is said Roger B. Taney was the first chief-justice of the United States Supreme Court who ever ventured to give judgment in trousers.

Judge Chase, appointed an associate-justice of the Federal Court in 1796, never appeared on the bench without a three-cornered hat

and a profusion of ruffles. He was opposed to frequent appeals to the Supreme Court, and was in the habit of saying to the New England bar that their appeals from one jury to another for the trial of facts made every case a rubber, so that the winning party must gain two out of three games or he lost the stake.

In this chapter we shall only briefly refer to some of the opinions pronounced by Judge Jay while chief-justice of the Federal Court, in which there were no cases of importance adjudicated until a term of the court which convened August 12, 1792. At this term the case of the State of Georgia v. Brisford and the celebrated case of Chisholm v. Georgia were argued on preliminary questions only. At the following February term, held at Philadelphia, 1793, the case of Chisholm was brought on for argument. This case was important and exciting, involving entirely new questions, and the important political results, which it was believed would follow the decision, rendered it a momentous case. The doctrine of state sovereignty and state rights was brought before the court for adjudication.

Is a state amenable to the jurisdiction of the Federal court, at the suit of a citizen of another state? Do the United States constitute a nation? were among the great questions in the case.

Chisholm was a citizen of South Carolina, a man of great wealth, ability and determination, having as he believed, a just demand against the State of Georgia, as he was advised by the ablest counsel in the State of South Carolina. When payment was demanded it was indignantly refused by the governor and counsel of Georgia, and an action was promptly brought against that state, by service of protest on the attorney-general and governor. The state refused to appear in obedience to the protest, and Edmund Randolph, attorney-general of the United States, one of the ablest lawyers known in the legal history of the nation, made a motion before the court that unless Georgia entered her appearance before the next term judgment would be entered against her by default.

Nothing in the history of the republic has ever caused the excitement which this motion produced, except South Carolina's act of nullification and the rebellion. It is true that in a case against the State of New York a motion had been made to compel an appearance in the Federal Court. But while the court held the questions involved under consideration the suit was continued. In a Maryland case of a similar nature the attorney-general of that state voluntarily appeared. The State of Georgia peremptorily denied the jurisdiction of the Supreme Court of the United States,

and declined to appear in obedience to the motion of Attorney-General Randolph. But when the case came up for argument Georgia presented through distinguished counsel a solemnly written remonstrance and protest against the proceedings of the Federal Court.

Upon these questions the judges, after due deliberation, pronounced their opinion. That of the chief justice alone places him first among American judges. The ten pages it occupies in the volume of reports containing it are the proudest monument that could be erected to his fame. The opinion should not be merely referred to, or read casually, or on the spur of a particular occasion. It will repay the deepest study of a lawyer, scholar, statesman and student. It is a model of juridical reasoning and eloquence. As was said of one of Mansfield's opinions: Everything is omitted that is unnecessary; the judge seized, with surpassing tact, the strong points in the case, holding them steadily before the mind, leading it step by step to the desired conclusion. "I shall discuss the question," said Jay, "as purely constitutional, and shall examine it in three propositions."

"First—In what sense is Georgia a sovereign state?"

"Second—Whether suability is compatible with such sovereignty."

"Third—Whether the constitution authorizes such an action against her."

In answering these interrogatories he drew a distinction between a sovereignty, where the power is vested in a singular person, and a state, where it is lodged in an aggregate of individuals.

"It is admitted," he said, "that a state possesses the power to sue a citizen, and why, therefore, may not a man sue his fellows in the aggregate? The constitution gives the court jurisdiction over controversies between a citizen and another state, and in no respect does it dictate who shall be plaintiff and who defendant. Surely, while it enables a state to be a plaintiff, it in nowise debars it from being a defendant in a suit, it might be, by the same individual. The sovereignty of Georgia, therefore, is not absolute, but subordinate to the nationality of the United States."

Chancellor Kent, commenting upon this doctrine, says: "It is remarkable that the Federal Court, in one of its earliest decisions, should have assumed a jurisdiction, which the authors of the federalists had a few years before decided to be without a color of foundation."

The court decided against Georgia, and its legislature promptly passed an act condemning to death any person who should attempt to serve process of execution, which followed the judgment of the court. No attempt to do this was ever made; but the next year the constitution was amended, so that it largely counteracted the effect of Jay's decision. But, as has well been said: "Its logic remained uncontroverted. It established the principle that the Federal Court is a supreme interpreter of the constitution, and the language of the chief-justice was long cited as disproving the doctrine of state rights."

Nothing can be more interesting and instructive than the study of the exciting political trials which grew out of the foreign relations of the United States that took place during Jay's judicial career. He established the doctrine of a common law jurisdiction in criminal cases in the Federal Court. He applied the principles of the common law in the largest sense in the case of Ravra, an American consul at Genoa, indicted for sending threatening letters to the British Minister and other high officials, with the view of extorting money.

The first cycle of our nationality was rounded off before the United States Supreme Court pronounced any important judgments on constitutional law, except those which, as we have seen, were pronounced by Jay, asserting the liability of states. Marshall had not delivered those opinions on constitutional law which Jefferson was in the habit of denouncing, "irresponsible judicial vetoes." "I defy ancient or modern learning," said Jefferson, speaking of the Dartmouth College case, "to produce one hundred and fifty pages of more recondite and irreconcilable contradiction, obscuris vera involvens, than is found in Marshall's opinion in the Dartmouth College case. There is more learning, more real, practical knowledge of constitutional law, more solid movement of argument, in Jay's opinion in the case of Chisholm v. Georgia than can, by the most severe study, be found in Marshall's vaunted opinion in the New Hampshire College case. The truth is, Webster took Marshall by storm and by boring for water in that case. There is not a judge in America who knows how to rule by it, or who can decide what laws are, and what are not, ex post facto."

At Richmond, Va., Jay presided at the great trial of Ware, administrator, v. Hilton. This case occupies a conspicuous place in the legal annals of Virginia and those of the Union. It brought to the forum John Marshall, who was then at the bar. He was associated with Patrick Henry, who appeared for the defendant;

while the truly great lawyer, John Wickham, the pride of the southern bar, the leading counsel for Aaron Burr in his trial for high treason, appeared for the plaintiff. Jay's charge to the jury is the best specimen of his legal learning, strength and compactness of statement and reasoning. It was a splendid termination of a judicial career.

The verdict of the jury established the principle that debts due British subjects by citizens of Virginia should be paid, notwithstanding the acts of her legislature passed prior to the adoption of the constitution, which prohibited their recovery. Jay charged the jury that the revolution had not annulled the debt, even though the amount had been paid into the state treasury, and the court could take no cognizance of the breach of a treaty in bar, without an act of Congress to that effect. The decision overruling the proceedings of the Virginia court, and the acts of her legislature, is an unequaled interposition of judicial power. The excitement which followed it was also unequaled.

Brief as were Jay's services on the bench, they "permanently established the dignity of the Supreme Court, placing it beyond the encroachment of the federal executive and legislative department. It established its jurisdiction over the state government. It decided the foreign relations of our Union, which have been accepted and followed from his day down to the present time."

During Jay's judicial term he was the confidential legal counselor of Washington, who on all intricate legal questions preferred his advice to Hamilton's. He also sought his advice in the delicate foreign complications that embarrassed his administration.

In many respects there is a strong similarity in the structure of Jay's mind to that of Judge Story's, which, as has well been said, "was rather solid than brilliant; more active than imaginative; more acute in comparing than fertile in invention. He was not a rapid, but a close thinker; not an ardent, but an exact reasoner; not a generalizing, but a concentrated speaker. Finally, the prevailing character of his mind was judgment in arranging all its material in lucid order, molding them with masterly power, and closing the results with impregnable logic."

Such was John Jay, the favorite son of the State of New York, who gave him with all his high intellectual powers to the nation, to preside over its great supreme tribunal.

When the statue of Kent was presented to the city of New York, the unrivalled orator and diplomatist who presented it to the distin

guished assembly said:

"As proudly as Phideas' statue of Minerva, in the Athenian Parthenon, presented in her open palm to the gaze of the admiring Greeks the figure of the Goddess of Victory, does the State of New York now display the statue of her Kent."

With equal pride does the State of New York look upon the statue of Jay, that embellishes the capitol of the nation, and this pride is shared in by all the states of the republic.

The first associate judge of the Supreme Court of the United States taken from the bench and bar of the State of New York was Brockholst Livingston. He took his seat on the bench of our State Supreme Court in 1806, after honorable and brilliant services as judge of our state court. He was a brother-in-law of John Jay, a brother of that illustrious statesman, Robert R. Livingston, and of that profound scholar, legist and commentator, Edward Livingston, the strength and intellectual power of Jackson's administration. Like Aaron Burr and Hamilton, he won renown in many hard fought battles of the revolution, and came to the bar while yet youug in years, a veteran from fields "where the death shots fell deadliest." While in the practice of his profession he became to the bar of the State of New York what Henry Brougham was to the English bar. His career on the bench of the Federal Court extended through seventeen years, and terminated suddenly March 12, 1823.

He was succeeded by Smith Thompson, one of the most learned, eloquent and sagacious jurists known in the legal history of our state. Like Brockholst Livingston, he was an associate justice of our Supreme Court. He took his place on the bench of the United States Supreme Court in September, 1823. He died at Poughkeepsie, December 18, 1843. It now became the duty of John Tyler, then President of the United States, to appoint a successor to Judge Thompson.

Over this appointment a most singular contest occurred, showing how deeply the choice of judicial officers of our republic can be affected by outside influences and prejudices. The contest was finally decided through the management of one of the most adroit and distinguished politicians of those times. What line of policy was adopted to bring about a result, at the time considered mysterious, we shall know in the following pages.

Soon after the death of Judge Thompson, Tyler sent the great name of John C. Spencer, one of the most eminent lawyers in the Union, to the senate for confirmation as associate justice of the Federal Court. Mr. Spencer was one of the unrivaled revisers of the statutes

of the State of New York, occupied many high official positions in the state and nation, was then secretary of war in Tyler's cabinet, and it was generally believed his nomination, which was popular with the bar of the Union, would be confirmed instanter. But, to the surprise of the country, he was rejected by the senate, in which the whigs were dominant. Mr. Spencer was a leader in that party. The schism between President Tyler and the whig party was then complete; the whigs considered Spencer's acceptance of a place in the cabinet as an abandonment of his fealty to the party, and a commitment on his part to support Mr. Tyler in his policy, which they considered not only detrimental to the nation, but personally treacherous to his party. On the rejection of Spencer, the president, rising above party predilection, sent the great and illustrious name of Silas Wright, a leading democratic senator in congress, to the senate as Judge Thompson's successor.

When apprised of his nomination, Wright, in graceful and decisive terms, declined the appointment, much to the regret of the bar and people. Had Mr. Wright accepted the nomination, the bench of the United States Supreme Court would have had added to it a great, brilliant and powerful luminary, but the Senate of the United States would have lost one of its chief ornaments.

By the declination of Mr. Wright the vacancy on the bench of the Supreme Court continued; but at length two illustrious judicial officers of the state were named by the bar and the people as candidates for the appointment to the vacancy. Both were distinguished for peculiar judicial abilities and a long and useful service on the bench. These candidates were Samuel Nelson, then chief justice of the state, and Reuben Hyde Walworth, chancellor of its great Court of Equity. It was soon ascertained that President Tyler strongly favored the chancellor, and his name was sent to the senate.

The whigs, as we have said, were in the ascendant. The chancellor was mildly a democrat. It was, therefore, the policy of the whig members to postpone action upon the nomination until after the approaching presidential election, in the hope that an appointment might be made more agreeable to them.

The matter was continued until the winter of 1845. In the meantime Mr. Polk had been elected president, and thus the hopes of the whigs that a nomination more acceptable to them would be made were removed. All objection to the nomination of Walworth had now vanished. The bar, the judges of the Supreme Court, members of the State Legislature, without distinction of party,

united in a petition to the senate, asking the confirmation of Walworth's nomination. Thus the contest between the two great jurists seemed settled; but the friends of Nelson pressed his appointment with singular sagacity and determination. Through the vigilant efforts the confirmation of Walworth was delayed until President Tyler had but a few months to serve; but Walworth's friends were confident that the president would adhere to his nomination of the chancellor, which he did, and his friends daily expected his confirmation.

But a singular and unprecendented circumstance occurred, which entirely changed the president's mind, causing him to withdraw the name of Chancellor Walworth and send that of Chief Justice Nelson to the senate for confirmation. Some friends of the latter happened to learn that Tyler traced with much family pride his genealogy far back in English history in the days of Watt Tyler, claiming to be a lineal descendant of that celebrated character. It was also learned that Chancellor Walworth, with equal pride, traced his ancestry back to Lord Mayor Walworth, "who, with his own right hand and trusty sword," killed that same Watt Tyler, who as he claimed, was in open rebellion against his king; that the chancellor was never weary in relating his gallant achievement of his doughty kinsman; that he used to dwell with delight upon the particulars of the contest, which resulted in Tyler's death; that an elegant portrait of the Lord Mayor, holding in his hand the good sword with which he slew Tyler, graced the chancellor's parlor, with a coat of arms of the Walworth family.

President Tyler often indignantly alleged that the lord mayor, instead of slaying his ancestor in open combat, approached him unobserved, and struck him down with a murderous battle-axe, which amounted to cowardly assassination.

The pride of ancestry, developed by this circumstance in English history, was brought into this judicial contest with singular effect.

Among the friends of Chief Justice Nelson was William P. Hallet, of New York City, a man standing very high in political and legal circles, for many years clerk of the old Supreme Court, and, as we have said, one of the most adroit and influential politicians of that day.

The circumstances above related, concerning the ancestry of the two candidates for the office of justice of the Supreme Court of the United States, coming to his knowledge, he determined to turn them

to the advantage of his friend, Mr. Justice Nelson. Accordingly, he hastened to Washington, sought and obtained an interview with Tyler, sagaciously referring to another appointment that was pending. After spending some time in conversation, Hallet very naturally approached the real subject of his visit, in the following ingenious manner, apparantly without any object in view. He turned the conversation to Mr. Tyler's family in Virginia.

"You are, I believe, of English descent, Mr. President? At least I judge so from your name."

"That is true, Mr. Hallet."

"I learn that you trace your ancestry to a rather remote period in English history. Was the celebrated Watt Tyler one of your ancestors?"

"He was, and I confess some pride in tracing my ancestry to him, notwithstanding some historians, ignorant of his true character and career, call him a traitor, alleging that he died the death of a traitor."

"You have a right, Mr. President, to be proud of your relationship to Watt Tyler. Like John Hampden, he was called a traitor, but he died a martyr to his devotion to popular liberty. Hampden, you know, gave his life in resisting the encroachment of the crown in the way of unjust taxation. So we may say of Algernon Sidney, Raleigh, and others. Your ancestor lost his life in resisting the undue encroachment of the king and parliament on the rights of the people. It is, therefore, right to enroll the name of Watt Tyler among those great martyrs of liberty."

"These are my views, Mr. Hallet, and I am proud of the intrinsic merit of my ancestor as a gentleman by birth and high standing, and, as you say, a noble defender of popular liberty; his murder was a stain upon the history of England, and the work of an assassin who by many is lauded for what they term a heroic act."

"Perhaps, Mr. President, you are not aware, that we have a lineal descendant of his murderer in our state, who occupies a high judicial position," said Hallet."

"I am not aware of it. May I ask who is this person?"

"Certainly. It is Reuben H. Walworth, chancellor of our Court of Equity," said Hallet.

"Can it be possible!" said Tyler, with a start of surprise.

"Certainly; and this is not all. In one of his parlors there hangs a full length portrait of Lord Mayor Walworth, his lineal ancestor. The chancellor takes great delight in describing the heroic

act of his great ancestor in striking down with his good broadsword Watt Tyler, the arch rebel, as he calls him."

For some time the President made no reply. Hallet saw that his shaft had struck the mark, and he gracefully changed the topic of conversation, carefully avoiding through the whole interview alluding to Chief Justice Nelson, and in due time Hallet took his leave, confident that Samuel Nelson would be the next associate-judge of the United States Supreme Court from the State of New York.

Not long after this interview, to the astonishment of the public and the disgust of the friends of Walworth, the president withdrew the chancellor's name and sent that of Chief-Justice Nelson to the senate. It was promptly confirmed.

This action of President Tyler was a mystery, one of the deepest of his administration. Many supposititious reasons were given, but none was satisfactory. Of the authenticity of the explanation we have given there is no doubt.

Judge Nelson took his place on the bench of the Supreme Court in February, 1845. For twenty-six years his decisions and opinions reflected lustre upon the august tribunal. We find in them the diligence, accuracy and well-poised judgment of Marshall, joined to the graceful diction, profound learning and clear analysis of Story. His concurrence in the opinion of Chief-Justice Taney, in the Dred Scott case, deciding that, if congress possessed the power, under the constitution, to abolish slavery, "it must necessarily possess the like power to establish it," subjected him to the sharp criticism of the opponents of slavery. But during the rebellion he upheld the administration of Mr. Lincoln, and his advice, given off the bench to the president, was a source of strength and encouragement to him.

Judge Nelson retired from the bench of the Supreme Court in 1871, and was succeeded by Hon. Ward Hunt, of Utica, N. Y., who was succeeded by Mr. Justice Samuel Blatchford.—*The American Lawyer*.

REGISTRATION OF LAND TITLES.

HON. EDWARD H. FITCH.

The history of jurisprudence illustrates how slowly in all ages have been wrought the changes both in the separation of property and the mode of its transfer. Individual ownership has long been recognized, but the history of the gradual separation of property until the full recognition thereof was established, covers years of time and forms no inconsiderable part of the world's history.

To the student of ancient law, after the individual ownership was conceded, the history of the changes in the modes of transfer is an interesting study and has a peculiar fascination. Words, gestures and ceremonials were long used before written forms were introduced. As an eminent author states it, "An ancient conveyance was not written but acted. Gestures and words took the place of written, technical phraseology, and any formula mispronounced, or symbolical act omitted, fatally vitiated the proceedings." These were, as has been said, "Stumbling blocks to good faith and stepping stones to fraud."

As civilization advanced, those blocks and stones were removed, and written forms were established. These forms were verbose, cumbersome, and rarely understood by the parties in interest. At the present time these forms are greatly simplified, and yet, words are multiplied and phrases reiterated that could well be omitted.

Later it became necessary that the written forms of conveyance of realty should be registered or recorded. In this country the system of recording was adopted. Now in every county in every state great numbers of volumes are to be searched to find the true state of each owner's title. Such a burden has this become, and so great is the cost, that a change to more simple methods is required. Some improvement is demanded and the old system must give way.

No change in the law is, at the present moment, attracting as much attention and discussion as improvement in the methods of the transfer of realty. In the eastern states this is largely owing to the great accumulation of volumes to be searched and the cost of ascertaining therefrom the exact condition of the holder's title. In

the west this change is demanded by the utter confusion of titles that has been brought about in various ways, and which was, and is, made possible under the existing statutes.

The system of land transfers by registration of title has been long in use in Prussia, Bavaria and in Hamburg. The registration of titles, under what is now known as the Australian or Torrens system, has been adopted since 1858 in South Australia, since 1861 in Queensland, since 1862 in Victoria, since 1884 in Ontaria, since 1885 in Manitoba, and also in some of the other British provinces. Wherever it has been introduced it meets with great favor and gives general satisfaction.

Its adoption in the United States is being urged, and at least six states—Massachusetts, Rhode Island, California, Utah, Illinois and Ohio—have, through the action of their legislatures, appointed commissions to draft bills embodying the main features of this system, and to report the same to the legislatures of their respective states. In twelve other states the question is being agitated, and steps are being taken to secure its enactment.

In Illinois the commission, on Dec. 10th, 1892, made report to the Governor and submitted therewith "A bill for an Act concerning Land Titles." The report of this commission is very comprehensive, and states very fully the advantages to be gained by the adoption of this system. After enumerating many of the defects of the present system, the commissioners in their report declare: "No way is perceived by which the present system can be retained and these defects removed," and "After a careful examination of the different methods of transfer of real property now in use in the civilized countries of the world, the commission beg to recommend the introduction in Illinois of a system containing the essential features of what is commonly known as the Torrens System of Registration of Title," and also, "Your Commission are of the opinion that the essential features of the Torrens system may be adopted and used in the State of Illinois, without amendment to our constitution, or material changes in our existing laws."

The commission also reports: "Compared with the defects found in our present system, the proposed method of transfer by registration of title, as demonstrated by its actual workings in other countries, shows the following advantages: 1, Expense; 2, Quickness; 3, Security; 4, Shortening of the records; 5, A safe method of much more quickly transferring titles, at a smaller cost, increases the salable value of the property."

In Ohio an Act "authorizing the appointment of a commission to draft a bill to simplify and facilitate the transfer of real estate and the registration of titles and liens," was passed April 25th, 1893; 90th Ohio Laws, 310. This act provides that "The Governor shall appoint a commission consisting of three suitable persons to draft a bill embodying the principles of the Torrens system to land transfers with such changes as may be deemed necessary to adapt the same to the laws of Ohio, and report the same to the General Assembly."

Under this act Governor McKinley appointed Edward H. Fitch, Elam Fisher and Isaiah Pillars as members of that commission. The commission organized at Columbus on June 9th, 1893. Edward H. Fitch was made chairman and Elam Fisher secretary. Since the organization of the commission it has been engaged in the preparation of the bill, but was delayed on account of the sickness and death of Hon. Isaiah Pillars. On the 5th day of February, 1896, Gov. Bushnell appointed Judge M. W. Oliver, of Cincinnati, to fill the vacancy caused by the death of Mr. Pillars. The commission on the 25th day of March, 1896, reported the bill which they prepared under the act. The difficulty the commission experienced was in adapting the Torrens system to the laws of Ohio, the constitution and laws of Ohio necessitating many changes in the original act. Again, the Torrens system, as enacted in the provinces of Great Britain, is somewhat cumbersome in its many details, and in the number of certificates which are permitted to be issued. The commission in Ohio determined to permit only the owner of the fee simple title to register and receive a certificate of title, all lesser and inferior estates and liens to be registered as memorials on the folium of the volume of the register of land titles containing the registration of the fee simple estate. The effect of this is to greatly simplify the Torrens system. It avoids confusion, and has a tendency to prevent mistakes liable to be made where certificates were issued for all inferior estates and liens upon the land.

The main features of the Torrens system are: First, registration of the owner's title upon a separate and distinct page of the volume of the register of land titles; second, to make certain that the title so registered is an indefeasible title; third, that the page of the registration of titles shall also show every estate, lien and charge thereon; fourth, that no estates, liens or charges not noted on the register shall be operative or in any manner affect those dealing with registered lands. When these features of the Torrens system are secured, we have for all practical uses and purposes not only adopted

the Torrens system, but have obtained all the advantages to be derived therefrom.

The bill prepared by the commission, which was duly enacted into law, secures all the advantages of the Torrens system, as above noted. The bill provides that the owner, or whoever has the power of appointing or disposing of, an estate in fee simple in any land in this state may register the same; that perpetual leaseholds shall, for the purposes of the act, be held and treated as fee simple estates; that when such owner has established in the mode provided by the act his fee simple title, the recorder shall issue to him a certificate, which certificate shall be an exact copy of the folium of the register of land titles on which the land is registered and shall be the owner's certificate of title. When so registered all existing lesser estates, liens and charges, and all subsequently acquired estates, liens and charges, are required to be entered as memorials upon the folium of the register and upon the certificate of title, the entry upon the register being necessary in order to acquire any estate, lien or charge upon registered land.

No certificate of title is issued to the owner of such lesser estate, lien or charge, but a certified copy of the register can be obtained of the recorder upon payment of the fee therefor. In this way every right of a party having a lien or charge against registered land is fully protected, and at the same time the liability to mistakes or omissions is very largely reduced.

The Ohio act is the only one, of which I have knowledge, which thus simplifies the Torrens system and puts it into operation in so plain and simple a manner. In brief, the bill declares who may register as above stated; the requisites and form of application to register; provides that the application to register shall be filed in the Probate Court or Court of Common Pleas, and gives to the Probate Court of each county full and complete common law jurisdiction over all matters and for all the purposes of the act. The court in which the application is filed has power, without consent, to refer the application for hearing to a referee. It requires that in the application all adjoining proprietors, all persons in possession and all parties known to have an interest in the land, shall be named therein.

A provision is made that where boundary lines are indistinct or uncertain, a surveyor shall be called, lines established, a plat thereof made and recorded in the recorder's office. A notice is also required to be published of the time and place for the hearing upon the appli-

cation and who are found to have any interest in the land. At the hearing if it is found that the applicant is entitled to have his land registered under the act, an order is made that he be entered as the registered owner, and a certificate of title issued to him as such. Thereupon a copy of such order, with the papers filed in the case, are transmitted to the recorder, who thereupon registers the land in the register of land titles, upon a separate page, which is called a folium in the act. Upon the folium the recorder is also required to enter, in brief form, which is denominated a memorial, all lesser estates, interests and liens.

After the land is registered, no judgment, pending suit, or lien of any kind, takes effect or is in force against the land, until a memorial thereof is entered upon the folium of the register.

The bill requires that all officers levying upon or attaching registered land, shall cause such memorial to be made, and all taxes and assessments of every kind are also required to be entered before becoming a lien.

It will thus be seen that every charge or lien affecting the land can be found upon the folium where the land is registered.

The recorder is required to keep both tract and alphabetical indices referring to the volumes of the registers of land titles.

The bill does not make registration compulsory. Upon the decease of a person his real estate passes to his personal representative the same as personalty, and in the case of unregistered land the personal representative may make application to register. In case of registered land the personal representative is entitled to receive a certificate of title. Under this provision an estate can be much more readily settled and distributed, partition can be made, and every right and interest secured during the administration. No sale of a decedent's land can be made without an order of the court, as required by the present statute.

An assurance fund is provided, which is raised by the collection of one tenth of one per cent. on the value of the land as then appraised for taxation. This assurance fund is required to be invested by the county treasurer in United States or state bonds, or the bonds of counties, townships or municipalities of this state. This fund is raised for the purpose of indemnifying any person who may in these proceedings be deprived of an interest in land. It is only collected on first registration, not on transfers.

Those who may bring an action against the fund and the proceedings thereunder, are enumerated in the bill, and a limit of ten

years is fixed, beyond which no action can be brought against the assurance fund.

Such, in brief, are the main provisions of the bill. It is too long to be given in detail. To illustrate the workings of this system as stated in the report of the commission:

A. B. owns a tract of land, part of which is subject to liens, another portion to a lease for ten years, while a part has been sold for taxes and the bounderies are indefinate and uncertain. He files his application to register. The bounderies by an accurate survey are clearly defined and marked, the taxes are paid, the land is ordered registered, and after the land is entered and the lease and all the liens are noted as memorials on the register of title, a certificate of title is issued to the owner of the fee simple.

Thereafter no search of the records is required. In one office and on one folium of the register of titles, to which both tract and alphabetical indices are at hand to direct, a person can find the exact condition of the title and all liens and charges thereon, except judgments and decrees of United States Courts, and penalties and assessments of the United States.

After the land has been once registered no abstract will be required. The assignment and fransfer of the certificate will pass the title. Under this system, when the land has once been brought under its provisions, everything back of registration is done away with, and thereafter no search will be required except to examine the folium upon which the land is registered. In case of a transfer, which can be made by an assignment on the back of the certificate, analogous to the transfer of bank stock, on a new folium of the register the name of the vendee is entered and all unreleased lesser charges and liens are brought forward; a reference is made to the former folium, where is also a reference to the new one, so that at all times the exact status of the title can be determined at a glance. While the first expense of the registration may be more than under the present system, thereafter it will be much less.

To secure the entry upon a folium of the register of land titles of the name of the owner of the fee simple of a tract of land, accurately bound and described, with memorials thereon entered of all lesser estates, liens, encumbrances and charges, and the instruments creating the same filed with or recorded by the recorder, and thus establishing an indefeasible title free from all estates, liens and charges not so noted, is the aim of the Torrens system; this, as passed, the bill prepared by the commission insures to all owners in

fee simple of land within the State of Ohio who accept its provisions and register their land.

The commission also prepared a joint resolution requesting the senators and representatives from Ohio to secure the passage, by Congress of an act requiring memorials of all judgments and decrees affecting registered land to be entered as memorials, and also all penalties and assessments under the laws of the United States to be so entered. If such an act is passed by congress, in one office and on one folium of the register of land titles, one can ascertain the exact condition of any tract of registered land.

This system is not an experiment; it has been tried and fully tested. The bill as passed, I doubt not, will be followed in other states, and ere long we shall have uniformity of laws in dealing with real estate. This of itself is of importance sufficient to the passage of the bill. I have thus briefly given the main features of the Torrens system and its mode of operation. The bill passed will be accessible to all and can be studied.

No measure before the General Assembly received the attention that was given this bill. No other so surely will benefit the people. It assures to the owners of land in Ohio confidence in their titles and a convenient and cheap method of transferring and dealing with their lands. It will save to them hundreds of thousands of dollars. —*Western Reserve Law Journal.*

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NOTES.

With this number the MICHIGAN LAW JOURNAL presents a review of the subject of Fraud in Contracts of Sale from the pen of Hon. Levi T. Griffin, who has been so deservedly popular as a lecturer in the law school at Ann Arbor. We hope to publish in this same line of thought several other articles by the same author. He has been a successful, able practitioner and a very popular lecturer, and so, uniting the practical with the theoretical, we feel that these articles will be sure to command the attention of lawyers everywhere throughout the state.

In the last number of the MICHIGAN LAW JOURNAL an unfortunate error occured in the reading of the proof of the article of William D. Totten on the jury system. "Subordination of perjury" should have read "subornation of perjury."

Michigan lawyers and Michigan members of both branches of Congress should do all they can to aid in the passing of the Torrey Bill to regulate bankruptcy and insolvency. It has already passed the lower house and will soon it is hoped, receive the attention of the senate. It seems to meet the needs of the situation and is an improvement over previous attempts through Federal legislation. Jury trials are preserved. The great object to be attained however is that legislation through the general government will end the hopeless complexity of doing business in several states each of which may have entirely different laws regulating this important subject. The nearer the various states approach uniformity of laws the better for all concerned. This is something which can be wholly regulated through the general government and would take away just so much of the devergence from uniform state laws.

The New York State Bar Association recently formulated a plan for the organization of an International Court of Arbitration. The plan as arranged by a committee to whom the matter had been referred was unanimously adopted at a meeting of the association, specially called to take action on it. The scheme as now arranged as contained in the report of the committee includes the following recommendations:

First—A permanent international tribunal, to be known as "The International Court of Arbitration."

Second—Such court shall be composed of nine members, one each from nine independent States or nations, such representative to be a member of the supreme or highest court of the nation he shall represent, chosen by a majority vote of his associates, because of his high character as a publicist and judge and his recognized ability and irreproachable integrity. Each judge thus selected shall hold office during life or the will of the court selecting him.

Third—The court thus constituted shall make its own rules of procedure, shall have power to fix its place of sessions, and to change the same from time to time, as circumstances and the convenience of litigants may suggest, and all matters, whether pertaining to the rules and regulations of the court, the appointment of attendants or controverted questions between nations, shall be determined by a majority vote of the entire court.

Fourth—Said court shall have a clerk and as many deputy clerks as its business may make necessary, who shall be appointed by the court from time to time, and as circumstances require, but two clerks shall not be selected from the same country so long as either of the nations represented in the court shall be without a representative in the clerical force.

Fifth—Said court shall have one or more interpreters and court attendants, who shall be appointed by the rules and regulations applying to the selection of clerks and deputy clerks.

Sixth—Each nation represented in the court shall pay the salary and expenses of its own representative and attaches selected from its citizens, and the nation at whose capital the court shall hold its sessions for the time being shall provide a place for its sessions, local court attendants, and meet other necessary local expenses.

Seventh—Controverted questions arising between any two or more independant powers, whether represented in said "International Court of Arbitration" or not, may be submitted by treaty between said powers to said court, providing only that said treaty shall contain a stipulation to the effect that all parties thereto shall respect and abide by the rules and regulations of said court, and conform to whatever determination it shall make of such controversy.

Eighth—Said court shall be open at all times for the filing of cases and counter cases under treaty stipulations by any nation, whether represented in the court or not, and such orderly proceeding in the interim between sessions of the court, in preparation for argument and submission of the controversy, as may seem necessary,

may be taken as the rules of the court provide for and may be agreed upon between the litigants, and said court shall convene on call duly made by its presiding judge for the time being for the purpose of trial, submission of argument and disposition of the controversy, as provided by the treaty stipulations between the litigant nations.

Ninth—Independent powers not represented in said court, but which have become parties litigant in a controversy before it, and, by treaty stipulation, have agreed to submit to its adjudication, shall comply with the rules of the court, and shall contribute such stipulated amount to its expenses as may be provided for by its rules or determined by the court.

To secure early consideration of this important question and harmonious action on the part of all citizens of this and other countries who favor the organization of such tribunal, we also recommend:

Tenth—That the President of the United States be respectfully memoralized, on behalf of the Bar Association of the State of New York, and of such other bar and other associations in this country as may be pleased to join therein, at once to enter into negotiations with the representatives of the governments of Great Britain, France, Germany, Russia, the Netherlands, Mexico, Brazil and the Argentine Republic for a union with the Government of the United States in the laudable undertaking of forming an international court substantially on the basis herein outlined.

Eleventh—That correspondence be opened immediately with other bar associations in the United States, the action of the Bar Association of the State of New York communicated to them, and that such associations and other organizations, societies and individuals be invited to join in said memorial to the President, in order that action by the Government of the United States be secured at as early a date as seems practicable and consonant with such an enterprise and the dignity of the undertaking.

Twelfth—That correspondence be also entered into with like legal bodies in Great Britain, its colonies and other countries believed to be interested in such a movement, having for its purpose the encoutagement of every effort among civilized nations to compass peace and strengthen the bonds of brotherly love among nations.

The report of the committee concludes with a request that there be presented to the President of the United States a memorial urging his aid in carrying out the suggestions contained in their report.

The plan deserves the attention of all thinking men and peculiarily the attention of lawyers individually and as members of their bar associations. It is on their ground, within the range of their everyday ideas, and the organzation of such a court as proposed by the New York bar association, if accomplished through its instrumentality, will reflect immortal honor upon it and upon the members of the committee who formulated the report. Next to the man who in the far distant future shall discover a scheme to defeat death will be the man or men who will have abolished war.

LEGAL MISCELLANY.

After January 1, 1897, days of grace on promissory notes, etc., will be abolished in the District of Columbia. The bill providing for such abolishment has passed both houses of Congress and now goes to the President for his approval. The text of the bill is as follows:

"That on all notes, drafts, checks, acceptances, bills of exchange, bonds, or other evidences of indebtedness, made, drawn, or accepted by any person or corporation after the first day of January, 1897, and in which there is no expressed stipulation to the contrary, no grace, according to the custom of merchants, shall be allowed in the District of Columbia, but the same shall be due and payable as therein expressed, without grace."

Ownership of all the shares of a corporation by a less number of persons than the law permits, and the want of officers by reason of failure to elect or death, and the burning of a mill which it was the object of the corporation to carry on, are held in *Re Belton, 47 La. Ann. 1614, 30 L. R. A. 648,* to be insufficient to work a dissolution of the corporation. On the death of the person having possession of all the property of such corporation, it is held that his administrator is not entitled thereto, but that it should be placed under control of corporate agencies.

Clerks or employes of insurance agents, to whom they delegate authority to discharge their functions within the scope of the agency, are held, in *Goode* v. *Georgia Home Insurance Co. (Va.) 30 L. R. A. 842,* to have power to bind the insurer to the same extent that the agents themselves could do.

The South Carolina statute giving precedence over any railroad mortgage to a judgment for personal injuries, though subsequent in time, is held, in *Southern R. Co.* v. *Bouknight, 70 Fed. Rep. 442, 30 L. R. A. 823,* to be operative in case of a mortgage by a consolidated company formed by corporations of different states, although the entire property was sold as a unit,—especially as against a purchaser who agreed to pay all claims adjudged to be prior in lien to the mortgage.

The right of a passenger to be carried on the wrong coupon of a round-trip railroad ticket, where the coupons are detached by the conductor on the going trip, and the returning coupon, instead of the going coupon, is retained by the conductor, and the going coupon instead of the returning coupon is given to the passenger, which the passenger retains without discovering the mistake until he presents it to the conductor on the return trip, and then makes his explanation as to how the mistake occurred, was involved in the decision of the United States Circuit Court of Appeals in *Northern Pacific Railroad Company* v. *Pauson* (*70 Fed. Rep. 585*).

In accord with the holding of the courts generally, it was here decided that under such circumstances the passenger has the lawful right to be carried on his return trip on presenting the going coupon with the explanation; and, if expelled for not paying his fare, he is entitled to recover damages for the expulsion. The cases all proceed upon the broad ground that the passenger was wholly without fault, that he had done all that could reasonably be required of him to do, and that the railroad company by the mistake, carelessness or negligence of its agent was itself at fault. A select list of cases from many jurisdictions add value to the decision.

The disability of a member of the legislature to hold office, under a constitutional provision that he shall not hold office "during the time for which he is elected" is held, in *State, Childs* v. *Sutton* (*Minn.*) *30 L. R. A. 630*, to continue for the entire period of time for which he was elected, notwithstanding his resignation.

The erroneous order of a mayor for the imprisonment of a person for contempt, when made in court and within the exercise of his power, is held, in *Scott* v. *Fishblate* (*N. C.*) *30 L. R. A. 696*, not to make him liable to a civil action.

A constitutional provision forbidding exile is held, in *Ex parte Hawkins* (*Ark.*) *30 L. R. A. 736*, inapplicable to a pardon of a convict made on condition that he leave the state and never return.

A receiver of a building and loan association is denied authority to foreclose a mortgage under a power of sale contained in a mortgage held by the association. *Strauss* v. *Carolina Interstate B. & L. Asso.* (*N. C.*) *30 L. R. A. 693*. The case decides also that the affairs of an insolvent association are to be settled by charging borrowers interest to the amounts they have received, with a credit for all they have paid into the concern as dues, fines, or in other ways.

A riparian proprietor on a stream which is suddenly diverted by the act of God so as to flow elsewhere is held, in *Wholey* v. *Caldwell* (*Cal.*) *30 L. R. A. 820*, to have no right to go upon another's land to restore the water to the old channel, although the grant of his property specified the "water accustomed to flow in the stream." With this case will be found the authorities on the rights in the water of a stream as affected by the act of God or natural change of course.

The right of prior appropriation of waters is held, in *Isaacs* v. *Barber* (*Wash.*) *30 L. R. A. 665*, to have existed as part of the laws and customs of the state of Washington east of the Cascade mountains prior to the act of Congress on that subject. The operation of a flouring mill is held to be one of the purposes for which water can be appropriated. An extensive note to this case presents the authorities on the right of prior appropriation.

The rendition of a justice's judgment for more than is demanded by an affidavit of attachment is held, in *Gum-Elastic Roofing Co.* v. *Mexico Pub. Co. 140 Ind. 158, L. R. A. 700*, to be insufficient ground for an injunction against its execution. So, an injunction is denied against a judgment at law rendered against an infant, merely because of the failure to appoint a guardian *ad litem* for him or to bring his general guardian into the action. *Levystein* v. *O'Brien* (*Ala.*) *30 L. R. A. 707*. With these cases is an extensive note on injunctions against judgments for errors and irregularities.

A statute saving mortgages and other encumbrances on land at the time of the inception of other liens is held, in *Oriental Hotel Co.* v. *Griffiths* (*Tex.*) *30 L. R. A. 765*, to make the beginning of work upon the building the time of the inception of a mechanic's lien afterwards filed therefor, so as to give that lien priority over a mortgage given upon the building before its completion and before the lien was filed. To the same effect it is held in *Vilas* v. *McDonough Mfg. Co.* (*Wis.*) *30 L. R. A. 778*, that a merchant's lien for machinery placed in a mill is superior to a prior mortgage taken on the premises when the mill was unfinished, where the statute makes such liens prior to any which originate subsequent to the commencement of the construction of work for which the lien is claimed.

BOOK REVIEWS.

A TREATISE ON PLEADING, PRACTICE, PROCEDURE AND PRECEDENTS—AT LAW AND IN EQUITY. By HON. SAMUEL MAXWELL. Sixth edition, revised and enlarged. Lincoln, Neb.: State Journal Company, 1896. 959 pp. $6.00 net.

It has been the purpose of the authors "to produce a clear, concise, reliable, and thoroughly practical work, covering a broad range of subjects, and clearly stating the law and practice applicable thereto, with forms, in which the aim has been to secure, first, sufficiency; second, clearness and brevity."

Of course, in such an extensive and highly important branch of the law as the above title must naturally suggest to pretend to cover, with any degree of detail or elaboration, the numerous and intricate sub-divisions of such a subject would be utterly impossible. But true to his intentions, the writer has accomplished what he set out to do, and has given to the profession a work which, in our opinion, is deserving of not a little commendation. Judge Maxwell, for more than twenty years, held the very honorable position as one of the justices of the supreme court of Nebraska, which of itself speaks favorably as to his ability and fitness in undertaking to write on this particular subject, and by his long service on the bench he has been enabled to give to the reader the benefit not only of his own extensive knowledge of the law, but also of that valuable experience which comes only to those who have held such a responsible office. The style of his language is plain and simple, his thoughts are expressed with force and clearness, and the subject-matter of the text is arranged in a methodical and orderly manner. Although the book is written in a code state, yet the rules applicable to the code and common law states are given equal and impartial attention. The doctrines as laid down in the text are sustained and supported by ample and generous citations from the different states—Michigan cases being well represented among the references. Another pleasing feature of the book are the numerous legal forms contained therein, which makes it especially useful to the younger and less experienced members of the bar. As a text-book it will prove of great value both to the practicing lawyer as well as to the student.

ROOD ON GARNISHMENT—Embracing Substantive Principles, Procedure, and Practice, Defenses, Exemption Statutes, etc. By JOHN R ROOD. St. Paul: West Publishing Co. 1896. One vol., 613 pp.

One of the latest books from the West Publishing Co. is a treatise by John R. Rood on the Law of "Garnishment." The

importance of this branch of the law will be readily conceded by the practitioner of to-day, as it oftimes furnishes his client the only source of relief possible against his dishonest and unscrupulous debtor. But strangely enough, with all the innumerable text books which are constantly pouring in upon the legal profession, in which every branch and phase of the law has been discussed; yet there are but a comparative few of the authors who have considered this law of Garnishment of sufficient importance to warrant the writing of a book treating especially of this particular subject. Mr. Rood has been among the first to observe this apparent neglect or oversight, on the part of the text book writers, of this all important branch of the law; and, after a deligent and careful investigation, he has prepared an admirable work on the subject. His efforts have been expended in making a book of ready reference in which the decisions relating to the various points in the Garnishment law, may be quickly found. The matter is arranged in excellent order, with a very complete index to aid in looking up particular topics, and the number of citations referred to in the text is noticeably large. This book has the special advantage of being new, its references being as much as possible to the late decisions, and should be received with the consideration and appreciation which it truly deserves.

RECENT MICHIGAN DECISIONS.

CHATTEL MORTGAGES—FOREIGN JURISDICTION—PRIORITY OF LIEN.—Property upon which there was a mortgage executed in Michigan was taken into Canada and mortgaged. The mortgagee in Canada took possession but the mortgagor, without his consent, regained possession and transported the property back into Michigan where the prior lien holder asserted his lien.

Held:—That a mortgagee under a mortgage executed in Michigan upon property which was by consent taken to Canada is not entitled to priority of lien over a mortgage given in Canada and under which possession was given to mortgagee. *Vining* v. *Miller.* (May 12.)

CONDEMNATION PROCEEDINGS—EFFECT OF ACT No. 467, LAWS OF 1895, WHERE LAND HAS BEEN TAKEN UNDER THE PROVISIONS OF THE GENERAL LAW—PAYMENT OF AWARD—The provisions of Act No. 467, Laws of 1895, relative to the taking of private property by the city of Detroit do not apply to proceedings had under the general law (Act 124, Laws of 1883) when the verdict and judgment have been confirmed.

By allowing the time to elapse within which an appeal might be taken from the award, the Common Council must be deemed to have acquiesced in it, and the award must be regarded as conclusive and binding and in the nature of a judgment which the property owner has a vested right to have assessed and collected according to the terms of the statute.

Where the land has been taken, i. e. condemned, by the city under the provisions of the general law, the assessment to pay the award may be made in conformity with the provisions of that law. *Balch* v. *City of Detroit.* May 12, 1896.

CONTRACT—MUTUALITY.—Defendent contracted for the sale of timber with D. & G., who assigned their contract to B. & V. with defendent's written consent, but without waiving any rights secured to him by the terms of the contract. B. & V. afterward assigned their interst in the contract to plaintiff. The defendant made a verbial consent to this assignment, but received no consideration therfor. D. & C. afterward made default in the terms of the original contract, and plaintiff gave notice to defendant that he was owner of the contract under the assignment. Defendant refused to allow plaintiff to carry out the terms of the contract and plaintiff thereupon commenced suit to recover the worth of the timber over and above the purchase price. Defendant demurred to plaintiff's declaration and claimed that the agreement between defendant and B. & V., and that between plaintiff and defendant was void for want of mutuality.

Held: That no one was so related to D. & G. that they could enforce the contract against anyone but them, and that the agreement between plaintiff and defendant did not establish a contract that could be enforced, and that it failed for want of mutuality. *Jackson* v. *Sessions.* May 12, 1896.

CONTRACTOR'S BOND—PLEADINGS—CONSTRUCTION—LIABILITY OF SURETIES—1. In an action upon a bond, the sureties, under a plea of general issue without notice may show in defense to the action that the plaintiff is not entitled to recover because he is indebted to the principal upon the contract in an amount greater than the recovery sought.

2. In controversies arising on the construction of bonds with conditions for the performance of duties, preceded by recitals, the general undertaking is restrained and its obligatory force limited within the recitals.

3. When a building contract provides that the owner shall retain a specified portion of the contract price till the building is completed, its failure to retain that portion would reduce the obligation of the sureties on the bond pro tanto. *Marquette Opera House Building Co.* v. *Wilson, et al.* May 12, 1896.

CREDITORS—MARSHALLING SECURITIES—PRIORITY OF CLAIMS—COSTS.—A creditor has a right to obtain security in full for his claim against a failing debtor, even though the creditor may know that the debtor is insolvent.

As long as the transaction does not amount in law to an assignment for the benefit of creditors, a debtor is at liberty to pay or secure any of his creditors at the expense of others.

When a surety has given security for the payment of his debt he cannot compel the creditor to resort to action against the principal and postpone the enforcement of his claim by resort to the security.

In order to apply the doctrine of marshalling securities it is necessary that there be two funds which may be resorted to by the creditor. The naked promise of the debtor cannot be regarded as a fund in such sense that the creditor may be compelled to resort to suit and levy on property before resorting to property specifically dedicated to the payment of the debt

A note given in payment of an indebtedness to complainants was endorsed by the father of the makers, who subsequently gave complainants a mortgage to secure its payment. In an action brought to foreclose.

Held:—It being established that the note was given under an arrangement that it should discharge a pre-existing liability to the maker, the mortgaged property would become the primary fund out of which the debt should be realized, not only as between the surety and the complainants, but as between the maker of the note and the creditors of the surety.

Complainant's costs in the court below will be limited to single costs. *Webber* v. *Webber, et al.* April 21, 1896.

EXECUTOR—TRUST DEED—BOND—JURISDICTION—When a trust deed is given to executors by the residuary legaties for the purpose of carrying on a business, etc., and the will is admitted to probate, upon petition of one of the heirs to the Probate Court that the executor furnish new bonds, that court has jurisdiction and can order the executor to furnish sufficient bonds and accountings, and that the trust deed and will should be construed together. *In re Estate of Mary Jane Sweetser, Deceased.* May 12, 1896.

FRAUDULENT—CONVEYANCE—DECLARATION—In an action to recover damages arising from the sale of certain lots which the vendor represented were bounded by a duly platted street sixty-six feet wide, a declaration which stated the representation as to the street, made as an inducement to the vendee to purchase, that he believed and relied upon it, and purchased the land, and that the representation was false, and that he suffered damage by reason thereof, sufficiently states a cause for action. *Merrill* v. *Newton.* May 12, 1896.

GUARDIAN AD LITEM—FRAUD—EXECUTORS—TRUSTEES.—Failure to have a guardian ad litem appointed is an irregularity, but when no motion is made to dismiss an appeal of infants for want of such appointment, the informality can still be cured by the appointment of a guardian ad litem in the Circuit Court.

The question as to whether there was fraud in obtaining a consent to the allowance of an executor's account cannot be properly tried in the Circuit Court.

The same person may be named as an executor in a will and by the same instrument be constituted a trustee. When the will creates a trust, before the executor can discharge himself of his official responsibility he must do some act to change the character of his holding and show that the fund is placed safely where it ought to be. *In re Estate of John W. Sanborn, Deceased.* May 12, 1896.

HOMESTEAD RIGHTS—CONVEYANCE—VALIDITY OF SALE.—Mother of complainants, as administratrix of the father's estate, sold property after proper license and advertisement, which was reserved for the homestead for herself and children, to her second husband, who afterward deeded it back to her. She afterward sold the property and moved away with her children. The children are now of age.

In an action brought by the children to have the proceedings set aside as fraudulent and void, and have the legal title decreed in them.

Held:—That the property was properly sold, and that the children have no interest in the homestead which could be enforced at this late day, all of them having attained their majority and the homestead being abandoned. *Louden et al.* v. *Martindale et al.* May 12, 1896.

PROBATE LAW—APPEAL FROM ADJUDICATION AS TO RIGHTS OF INSANE PEOPLE—An order entered by a probate court in conformity with Act 204, Laws of 1895, determin-

ing the sanity or insanity of a person, is not appealable under the provisions of Section 6779, Howell's Statutes. *Sparrow* v. *Ingham Circuit Judge.* May 12, 1896.

MASTER AND SERVANT—LIABILITY WHERE CONTRACTOR IS EMPLOYER—DUTY OF OWNER OF FACTORY.—An action cannot be maintained against one as a master for injuries received by an employee in the course of his employment, it appearing that the plaintiff was in the employ of a contractor to whom the defendant furnished the building, tools and machinery with which to perform the work contracted.

Where the machinery and appliances were in a safe condition when furnished the owner could not be held liable for their negligent use, or for the rate of speed at which the machinery was run. *Beier* v. *Detroit Steel and Spring Works.* May 12, 1896.

PARTNERSHIP LAW—FORECLOSURE OF SECURITIES GIVEN BY ONE PARTNER—JURISDICTION OF EQUITY—Where proceedings in chancery are had to foreclose securities given by one partner to secure an individual as well as a partnership debt and the amount of the partnership debt is readily ascertained, a personal decree will be entered against the co-partners, it appearing that the interest of the co-partners in the property has been entirely disposed of. *McLean* v. *McLean, et al.* May 12, 1896.

SALE—PARTNERSHIP—EVIDENCE—In an action to secure the balance due on the contract price for the sale of stock purchased by one Middleton, who paid a portion of the purchase price and shipped the stock in his own name to Buffalo, where he was to sell them and pay the balance, it was claimed by plaintiff that the sale was made in behalf of a co-partnership of which the vendee was a member.

Held:—It appearing that a co-partnership existed between the defendants at the time of the purchase, which fact was known to the plaintiff and who relied upon it, it was not error for the court to instruct the jury that a recovery could be had against all. *Doty* v. *Nixon, et al.* May 12, 1896.

TAX SALE—ADVERTISEMENT—NOTICE—A tax deed cannot be attacked on the ground that the order fixing the term of hearing did not specifically set forth the year for which the taxes were assessed, it appearing that the form provided by the statute was followed.

The fact that the tax list was published in the Muskegon Weekly Chronicle while the Muskegon Chronicle was the paper designated by the Auditor General for such publication, will not render the publication void.

The law does not require that the designation of the Auditor General and the acceptance of the publisher be made public in any way.

A tax deed will not be set aside on the ground of insufficient notice to a non-resident where the hearing was set for the fourth day after the publication. *Waldron* v. *Auditor General.* May 12, 1896.

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THE FEDERAL JUDICIARY AND ITS ATTITUDE TOWARDS THE PEOPLE.

PERCY L. EDWARDS.

Antedating the adoption of the Federal constitution down to the present time there has existed a well defined difference of opinion between the two schools of statesmanship in which Hamilton and Jefferson warred with each other as do President Harper and Professor Bemis of the Chicago University to-day, over the construction of the "Supreme Law of the Land."

At the birth of our government, anyone who cares to read history, will inform himself of the distrust with which the people viewed the growth of ideas of centralization of power which later on were to crystalize into a fact, and the baptism of blood which followed on the birth of the Federal Union established the sentiment forever.

Hamilton was an Englishman who had imbibed his ideas from reading Plutarch. His was an aristocratic mind. His education and social environments emphasized it.

He was surrounded by conservators, aristocrats, the friends of a powerful rule. No wonder therefore that he held the views he did and advocated them so strongly. Hamilton was a good man. But he believed in the insidious use of Federal patronage to attract around his chief a powerful support. He advocated strongly a constitution based upon a principle which would never give way to any popular demand. And like Knox he felt the force of "State Systems" as inimical to the realization of his pet theory of a strong

centralized government approaching nearly to monarchy. In this spirit he arrogantly sought to influence the Supreme Court, through its Chief Justice Jay to come to his support in crushing our state assumption.

Far less brilliant, perhaps, was Jefferson, but he was more imbued with the spirit which had first led the colonists to make a home in the new world. The welfare of the people in whom rested all original power of government was his first concern. "It takes time to persuade men to do even what is for their own good" such a sentiment expressed by him serves to illustrate his carefulness in shaping his policy to the people's needs. His was the broadest and best idea of a nation. He looked for the glow of liberty, equality and fraternity to cast its softening effects over this land peopled by those who had eaten of the hard fruit of oppression and had come out of their bondage to enjoy that freedom of conscience and action which the laws of all good governments should guarantee to its subjects. He advocated "a wise and frugal government, which shall restrain men from injuring one another, which shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. This is the sum of good government."

If it were asked to-day which theory had triumphed, it were easily answered. The first fourteen amendments to the constitution were directed towards security of the people's rights as advocated by Jefferson. How they proved effectual may well be asked. Legislation and judicial interpretations of our elastic constitution, under the pressure of urgent exigencies, such as may arise at any time under our form of government, with the constantly changing conditions of society, have operated to make us a government with a strong central power, a sovereignty. This national sovereignty is now an accomplished fact, and it may be said that the theory of a strong centralized government of the affairs of this nation as advocated by the brilliant Hamilton, have triumphed. But is it well for the people of this nation that is should so triumph. The future must provide a complete solution of this as of all other questions.

We have reached a point in our political history where socialistic and individual views of government must collide. Incipient conspiracy of those disposed towards anarchy and revolution are not the real menace of this governmental policy. It is the onstride of intelligent thought. The quiet growth of consciousness in the masses. The spirit of freedom and equality of man which came

over from the old world with the Pilgrim Fathers and which has ever been present in our laws.

Making the test of every political act "does it tend to good government? If it does, it is good. If it does not it is bad, and is of no importance whether the act accords with a great principle or not."

Good government should be that which tends to promote the happiness and welfare of the people governed. As before remarked all power to govern in a democracy resides in the people. Hence the right that all laws made for their government should be so construed as to promote their happiness. This will never be accomplished through class legislation, or the construction of existing law so as to favor class or individual interests; and, in the construction of organic or statutory law, that rule should be applied which best interprets the law so as to meet the intention of its founders and to serve the ends of exact justice.

The people should have confidence in their government. There should be no distrust of any part of the governing power. The judiciary above all should be like Caesar's wife, above suspicion. That it is not so regarded by this present generation, one has only to read the daily press comments to learn. Undoubtedly, much of this growing distrust arises from misapprehension. That there is some cause for alarm may not be doubted. Decisions like those construing the late Income Tax act were done much to weaken faith in the Federal Judiciary and to cause alarm at the growing disposition of the supreme judicial authority to intrench upon and nullify the acts of an entirely independent department of the Federal government. Congress and the Federal Judiciary are coordinate branches of our government. Judge Cooley, (Constitutional Limitations, Chap. 7) has said in this connection "each is alike supreme in the exercise of its proper functions, and cannot directly or indirectly, while acting within the limits of its authority, be subjected to the control or supervision of the other, without an unwarrantable assumption by that other of power which, by the constitution, is not conferred upon it."

And again, "courts sit not to review or revise legislative action, but to enforce the legislative will: and it is only where they find that the legislature has failed to keep within its constitutional limits, that they are at liberty to disregard its action."

Further this eminent authority lays down the rule of law upon this subject as, "except where the constitution has imposed limits

upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the state, unless those rights are secured by some constitutional provision which comes within the judicial cognizance. The remedy for unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity must correct the evil."

In this exposition of the rule of construction there is nothing but the cold, hard logic of the law. There is no feeling of humanity such as actuated the framers of the national compact. None of the glow of life by which such men as Jefferson and Madison sought to construct and apply the law in the government of a people sovereign in their authority. Still it serves to define the limits of judicial and legislative authority.

We had our legal theories largely from England along with our civilization. In that country no such power dwells with the judiciary, so that it must stand as a theory peculiar to our form of government. This extraordinary judicial assumption of power is in line with the Hamiltonian theories of government and was promulgated in the first instance by no less a person than John Marshall. *Marbury* v. *Madison, 1 Cranch 137.*

There can certainly be found no warrantable authority for such assumption of power by a co-ordinate department of government in our Federal constitution. By the plainest implication the constitution would seem to prohibit such interference. While we are not prepared to agree with the claims of those who charge a deliberate intention to usurp the power belonging to another department of state on the part of our supreme court, there is such an evident conflict between our national legislature and the judiciary upon this construction of constitutional authority to cause grave apprehension for the future. In a conflict of this kind the dignity and usefulness of the highest judicial authority in the land is imperiled.

"The usurpation has steadily gone on, and finally culminating in the Sugar Trust decision, has placed the hold of the private corporations so effectually on the necks of the American people that they are struggling to get from under it like Enceladus struggling to get from under Mt. Etna."

Such language as the above is intemperate. Coming from an over zealous advocate of the people's rights it may be pardoned.

Coming from one who aspires to be regarded as a jurist and teacher of legal jurisprudence it is unfortunate.

To charge even by implication, the highest judicial tribunal in the land, the members of which are placed above political influence, with intentional subversion of constitutional right and political juggling, is certainly intemperate to say the least. But it is the expression of a somewhat prominent authority and therefore has its influence in moulding public opinion. It cannot be claimed that such language voices the sentiment of the people. There is a strong feeling of respect in Americans for the constitution and for the high judicial authority which protects it. And it would require much provocation to remove this deep feeling of confidence and respect. It is well for the stability of our form of government that this is so. The destruction of confidence of the people in a government by the people leads to confusion, to anarchy. The American sentiments of equality and fraternity, as breathed into the spirit of the constitution are strong to resist revolution. Drawing an inspiration from our constitution, patriotism forms a part of the education of the boys and girls of our land. It is breathed into the instruction of the teacher. Its "stars of glory" float over the school room; and its everlasting sentiment of freedom is found in the joyous laughter of the play ground. In this sentiment rests the stability of our government.

Governors of several of the states have deemed the situation of such grave importance as to call for official notice in messages to the legislatures thereof, and one of the Judges of the United States Circuit Court of Appeals. Judge William H. Taft in his address before the American Bar Association, August 28th, 1895, has replied to these criticisms and strictures.

The history of these courts from their institution shows many instances where the exercise of jurisdiction has involved them in popular controversies and has subjected the courts to bitter reflections from those adversely affected. "Yet," Judge Taft says "the event has justified their course and shown the injustice of the attacks."

This assertion may do when it is directed towards the conflict of State and Federal authority where the constitution seems to have made provision for the superior authority being with the federal judiciary. The question of state rights under the constitution presented the first cause for the interference of the federal courts in the construction of the constitution. And here perhaps is to be

found the strength of the court's position on this great question. The federal courts cling to the theory of government as advocated by Hamilton and held a strict construction meant nationalization and strength. And in the face of the severe rebuke of Jefferson characterizing the supreme court as "a thief of jurisdiction," the events subsequent have proven the soundness of the position of the court.

We are not to discuss this phase of the question so much as that relating to acts of the federal judiciary in construing the constitution along lines suggested by the recent Income Tax decision and questions of a present economical importance.

Upon these questions of a political character there is and always will be more or less difference of opinion as to the relation of the judiciary to the federal constitution. But the verdict of the people has long since practically settled the question along this line and long acquiescence in the position of the Federal Supreme Court taken by John Marshall and his associates has given strength and encouragement to that tribunal to maintain its position, with reference to the constitution in which it met such bitter opposition from Jefferson and his followers.

We now come to a consideration of the more recent phase of this question. The attitude of the federal judiciary towards the people as affected by the great economical questions of to-day. It is very true that "the jurisdiction of the federal judiciary does not end with the enforcement of national law in the interest of the whole country against the temporary interest of a part."

But it is with this jurisdiction that we have to do. We are not unwilling to agree with Judge Taft in the assertion that nothing can be clearer to a calm, intelligent thinker, than that under conditions of modern society, corporations are indespensible both to the further material progress of this country and to the maintenance of that we have," and we might consent to the next proposition of his under proper restrictions. "The evils must be remedied, but not by destroying one of the greatest instruments for good that social man has devised." Whether or not we are to agree with this other proposition depends upon this: under our theory of the constitution and the spirit of our law, the people are guaranteed such conditions as "life, liberty and prosperity," and permitted in a general way, to join in the "pursuit of happiness." If to preserve these rights to the people it becomes necessary to attack, even to the point of destruction, these corporate interests, "instruments of greatest good,"

though they may be, then they must be attacked. The vast accummulation of wealth in the hands of a few may of itself become a menace to society. When used in combination for the purpose of a trust to stifle competition it is unjust, unlawful and inimical to the provisions of the constitution.

Judge Taft devotes considerable space in his paper to the struggle between labor and capital, and the relation of the federal courts thereto. He admits that judicial action has been much more efficient to restrain labor excesses, than to restrain corporate wrongs and greed, and points out that the nature of corporate wrongs are almost wholly beyond the reach of the federal courts. "The corporate miners and sappers of public virtue do not work in the open but under cover; their purposes are generally accomplished before they are known to exist and the traces of their evil paths are destroyed and placed beyond the possibility of legal proof." On the other hand the wrongs done by labor are open, honest trespasses and receive the immediate attention of the federal judicial eye. If the case is well and truly stated by Judge Taft, then summary action in the part of congress should not be delayed in coming to the aid of a part of government pleading imbecility in the face of the greatest enemy to this republic. That Judge Taft anticipates such action on the part of the legislative department of our government is evident from the wail with which he closes his case for his clients. Speaking of the effort to be made "to cut down the jurisdiction and cripple the efficiency" of the federal courts he says "If this comes, then the responsibility for its effects, whether good or bad, must be not only with those who urge the change but also with those who do not strive to resist its coming."

Where is the desire "to cripple the efficiency" of the federal courts in the matter of these corporate trusts and combinations, anyway? The court through Judge Taft has already pled weakness to cope with them. The people have looked to this authority to protect them from the grind of corporate greed. They do not wish the court to show less efficieney, but more, when through the manifest want of efficiency in the federal judiciary to protect them against the oppression of combinations and trusts, the people show an intention to right themselves, this same authority works smoothly and swiftly as if oiled for the occasion. Labor feels the efficiency of the court when it commits a trespass. Capital should also. This is in harmony with the spirit of the constitution.

To the watchful care and prudence of an independant judiciary

this same constitution was committed by the framers thereof. But this constitution was made for the people. The judiciary was made for the people and charged under constitutional provisions with duties contributing to the general welfare of the people.

Acting upon the authority of the court in the case of *Springer* v. *United States*, *102 U. S. 586*, the last Congress passed the Income Tax Act, believed to be necessitated by the emergency of the times. In the above case there was practically unanimous sentiment that such act of Congress was in harmony with the constitution. Yet in less than one year from its passage by congress and after a considerable portion of its revenue had been collected, the supreme court is appealed to for the arrest of the operation of the law upon the ground of its unconstitutionality. By a bare majority of the court, and not withstanding the most decided opposition of the minority, the act of congress, intended as a salutary relief form grave emergencies threatening the country, was held invalid, and the power of the national legislature to raise revenue nullified.

That congress has power to provide for the raising of revenue to pay debts and expenses of running the government, there is of course no denial. That it may be done in manner as provided by this Income Tax Act, the supreme court has decided in *Springer* v. *United States*, above cited, which opinion was rendered in 1880.

The constitution is that the supreme court has the right either from the original design of the framers of the constitution, or by usage and long acquiesence on the part of the people's representatives, the national legislature, to interfere and arrest the execution of legislation which in the opinion of the court is in derogation of that instrument. This power, whatever its origin, may be conceded to be so where congress through mistake or design acts in violation of the plain terms or the spirit of the constitution.

If there is one power vested in congress by the constitution which is and should be plainer than another it is the right to levy taxes. The experience of the men who made this instrument under the colonial confederation tought them that this government could not long exist without wholesome provisions concerning the power to levy and collect taxes. And they provided for this in the constitution itself and it was one of the powers first thought of when they measured the power to be vested in congress. And the federal judiciary has never seen fit before to thwart this exercise of a plainly granted constitutional right exercised by a co-ordinate branch of the federal government.

There can be no successful argument made against the proposition that the constitution intended that in congress should be vested the power of declaring what the law should be. Then if there is no apparent violation of constitutional authority in the act itself it should stand as the law. If there is grave doubt of the act conforming to constitutional provisions, the court, undoubtedly, should point out the error when appealed to for that purpose. But power to amend, modify or amend an act of the legislative branch of government, does not exist in the federal judiciary.

To claim more for the court "were to set the judicial power above that of the legislative, which would be subversive of all government," says Blackstone. *1 Bk. 91.*

Chancellor Kent has it, "the courts of justice have a right and are in duty bound to bring every law to the test of the constitution."

This is good if rightly understood. It is the assumed right, perhaps, of the courts, but in its application they must rightly construe the constitution.

The now dead Justice Jackson, whose end may have been hastened by a desire to fulfil to the letter the duties of his high office says in his opinion holding valid the entire act. "The decision disregards the well established rule or cannon of construction to which I have referred, that an act passed by a co-ordinate branch of the government has every presumption in its favor, and should never be declared invalid by the courts unless its repugnancy to the constitution is clear beyond all reasonable doubt It is not a matter of conjecture; it is the established principle that it must be clear beyond a reasonable doubt."

"Again, the decision not only takes from congress its rightful power of fixing the rate of taxation, but substitutes a rule incapable of application without producing the most monstrous inequality and injustice between citizens residing in different sections of their common country, such as the framers of the constitution never could have contemplated, such as no free and enlightened people can ever possibly sanction or approve."

And Justice Harlan in no uncertain language points out the inconsistent and unjust effect which such a decision has on certain kinds of property, thereby giving to such property as rents and the profits of land investments, and municipal bonds "a position of favoritism and advantage inconsistent with the fundamental principles of our social organization," and giving to them an undue advantage over that portion of the people of this country upon whom

rests the burden of taxation," and who ought not to be subjected to the dominion of aggregated wealth any more than the property of the country should be at the mercy of the lawless."

This is the kind of argument which breathes of the spirit of the constitution. That basic principle of the federal compact, the welfare of the people. In a hundred years the supreme court of the United States has not rendered a decision more important in its immediate effect, or more far reading in its consequences. Where public policy so plainly beckoned the way the court should go, it does seem as if their decision should have been different. There is no suggestion of political influence in the disposition of this question. It would be absurd to claim that. But there is the evidence of the Hamiltonian theory of government and the province of the federal judiciary in relation thereto. It is well if we do not forget that the essentials of good government are not just what they were a hundred years ago. All law is progressive in spirit. Its application must be timed to the changing conditions of society. Nothing devised by man is absolutely stable. His inventions are the product of a finite existence and must of necessity fit themselves to the exactions of the laws of infinity.

The comments of the press of the large cities have given a somewhat political significance to the finding of the court. But this journalistic expression of opinion on either side rests more upon the ground of historical connection than any other. And the socialistic problem is perhaps the biasing factor in influencing the comments of the press.

The Herald's (N. Y.) conception of the situation is found in a clever cut showing an overflowing, fluttering candle with a populistic light, just about being snuffed out by a cone shaped constitution held in the powerful hand of the supreme court.

The New York Tribune says: "The more the people study the influences behind this attempt to bring about a communistic revolution in modes of taxation the more clearly they will realize that it was an essential part of the distinctly un-American and unpatriotic attempt to destroy the American policy of defense for home industrious, in the interest of foreigners. The more they examine its methods the more clearly they will understand that it was intended as the beginning of a systematic appeal to the Lecklands and Leckalls against those who have incurred envy and hatred by thrift or enterprise. Thanks to the court, our government is not to be dragged into communistic warfare against rights of property and the rewards

of industry while the constitution of its founders remains a bulwark of the rights of states and of individual citizens." This is a stupid attempt to trap on a patriotic air to confuse and humbug the people as to the real situation.

Much more temperately does the N. Y. World put it. "The moral effect of the decision against the income tax is not what the enemies of the law hoped that it would be. They expected a heavy majority of the judges in their favor. They won by only a single vote, and that of a judge who reversed himself within a month. A decision that is carried by the narrowist possible margin and by a single "flop" losses greatly in weight and impressiveness. There was never a more strictly technical adherence to the letter that killeth, than in the majority opinion against the income tax."

That the case was decided by the application of a purely technical line of reasoning one has only to read the opinion of the Chief Justice, to believe. That no such technical construction of its terms was ever contemplated by the framers of that instrument may be inferred from the necessities which lead to its adoption by the people as well as the wording thereof. The general welfare of the people was the moving cause for the confederating of the colonists, as it afterwards became in solidifying the national character of the people.

The federal court by its decision has apparently disregarded any but the most technical construction and therein has added to the distance between the people and itself. This Income Tax law is as just a measure as any ever devised for the levying of a tax. All state governments and all the civilized nations of the world agree that the correct principle of levying the tax is to oblige wealth to bear its proper burden of taxation, but under this decision our government is now to be the exception, and the interests best able to bear the burden are to be exempt. This may be, technically speaking constitutional, but it is not in harmony with the proposition that this is a government by and for the people. The act of congress in passing such a law was demanded by the exigencies of the times. It was just. If it is just and the interests of the nation are better served by such a law, then it should be constitutional.

The people express their wishes through acts of the national legislature. It is the closest representative of the people, and the conferring of the law-making power on congress is conclusive that in the intention of the framers of the constitution this was to be a government of the people. It seems a wonder that error once established should grow so strong even in the calcium light of truth. But so it is in the

case of this assumption of legislative power on the part of the federal judiciary. The supreme court has not contented itself with its conceded prerogative of interpreting the acts of congress as to intent and making clear ambiquities, but it has imperceptibly, it may be, assumed the power which unquestionably belongs solely to the legislative branch of the government. When will the federal courts remedy this error into which it has fallen, or recede from a position which it may claim by right of inheritence, but which now in the light of the present conditions is not defensible?

In conclusion, let us look for a moment to what is likely to be the result of this conflict of authority.

Upon this question of the Income Tax, the federal court has assumed a more pronounced attitude in its claimed authority than ever before. Congress expressing the will of the people passes still another act of this character which the court, refusing to recede from its position, declares inoperative because of its alleged constitutional defects. Congress says, by the passage of an act that such is the law. In pursuance of its constitutional prerogative it levies a tax. The supreme court acting within its claimed sphere declares the law void. Now, if congress chooses to be pugnacious, an unseemly contest is precipitated between the two departments of the government. The federal authorities charged with the duty of enforcing the law for the collection of the tax, being backed by the executive and legislative departments of government, choose to ignore the action of the supreme judicial authority, what then! Or the resort to impeachment proceedings by congress and the removal of the judges of the court, what then!

Other nations of the world reviewing this spectacle of a great national comedy, or a tragedy it may be of republican government, are moved to the strain of philosophizing and inscribing historical epitaphs to the one republic which has defied philosophy.

LEGAL RIGHTS OF WORKING MEN.

ERVIN PALMER.

Rarely any thing of value is gained without cost, and usually those things which are most costly are most valuable, but not always most appreciated. Little do the people of our great republic, think of the value of the civil liberty secured to them by the statesmen and warriors who devised, defended, and preserved it. The pilgrims, puritans, and covenanters came to this land to secure for themselves freedom and equality. They permitted no opportunity to pass, without asserting and defending their rights. The delegates of the United Colonies assembled in Philadelphia in May 1776, by resolution "recommended to the respective assemblies and conventions of the United Colonies, when no government sufficient for the exigencies of their affairs had been established, to adopt such a government as should, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents, in particular, and of America in general." On the fourth of July following, the representatives of the thirteen colonies, in congress assembled at Philadelphia, for and on behalf those colonies declared, "we hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it and to institute new government, laying its foundation on such principles, and organizing its powers in such a form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed will dictate that governments long established should not be changed for light and transient causes: and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which

If these large fortunes only made those who have or inherit them, lazy and worthless citizens, they alone would be injured, but the power which great wealth brings to its possessor, is often used in an unlawful and selfish way, to exact and wring from the defenseless poor, unrequited toil and menial service. In fact this power is sought and used to oppress and enslave men. Millions of poor laboring men in this country are compelled to work for such wages as the rich are pleased to pay. They and their families eat bread like beggars out of the hands of these nameless lords and title less aristocrats, and in many instances these inheritors of wealth, who employ great numbors of laborers, can pay them what they please and when they please. They can feed them or withhold at their tyrannical will. The horrors of Homestead are fresh in the memory of all. The inhabitants of that town were employed in the iron mills, which were under the management and control of one man. They knew no other business than the manufacturing of iron and steel, and all they had was there. They were entirely in the grip and power of their employers. They fixed their wages, not according to the profits earned, but according to the arbitrary will of the employers, and they scaled their wages just so the laborers could be kept in good condition and be fit for labor, the same as they fed and cared for their draft or driving horses. The people there are as fully at the mercy of their employers as if they were slaves. Homestead is only a type of a large number of manufacturing towns in the country.

Year by year the rich are growing richer out of the earnings of the poor, and the poor are growing poorer and becoming more helpless. Their little cottage homes and small farms are being drawn in and swallowed up by the mortgage maelstrom. The chasm between the millionaires and the powerful corporations, owned and controlled by them, and the toiling masses is widening, and the spirit of lawless arrogance and tyranny on the one side has produced a spirit of defiance and resistance on the other, and if that spirit of resistance is not soon put under control, by wise and lawful measures, revolution, chaos and ruin must quickly follow.

Not only does the American aristocracy make and control the wages of them who serve them, and claim the lion's share in the division of the earnings of labor, but it makes the laws and controls the federal and state legislation. It is well known by those who have made themselves familiar with legislation, that it is almost impossible to have a law made which is injurious to the interests of rich bank

or railroad corporations. These institutions trade on the credit of the nation and make millions out of bonds guaranteed by it, and grants and contracts are made under provisions of laws enacted for their benefit. As a rule, only the rich are elected to congress. Not only are the wealthy elected to congress, but they grow richer on a small salary. They quickly become good financiers, for with a salary of five thousand dollars per year, they are able to pay out as much or double the amount of their salaries and at the end of a few years they have double or thribble their large fortunes. Men of ordinary understanding cannot see how such things can be honestly done. They feel that such legislators do not make laws for the good of the people but to enrich and protect the rich. The state legislators are not so often chosen on account of their wealth. Some are good men, but enough bad men manage to be elected to the legislature to control the legislation. They have "itching palms," and are willing to sell their vote and influence to the highest bidder. Their corrupt methods are well known. They legislate for the benefit of those who are able to buy and against the interests of the poor. Beyond all question, money is employed by wealthy corporations and men to control legislation, and the will of the people is thwarted and altogether ignored.

It is plain as before intimated, that the framers of the constitution failed in preventing American aristocracy and the evils that this disturbing element produce in a republic. It is easy to point out the failures and the bad results, from the existence of this class, and to show that revolution, chaos and ruin is threatened from this source, if some wise and peaceful remedy is not applied.

In diagnosing the disease of a patient, it is easy to find where there is an accute inflammation or sore, but it is quite another thing to apply a proper remedy, so that a speedy and perfect cure can be effected. Where the ailment is a slight cold or fever, some simple remedy is sufficient to restore health, but when the whole body is sick, and the vital parts are effected, quick and powerful remedies must be applied with vigor. When a limb is diseased and gangrene has set in, heroic treatment must be applied to prevent blood poison and save the patient. The knife must be used. The diseased part must be cut off. In other words, the dangerous character of the disease requires severity and thoroughness of treatment. It is never wise to withhold the proper remedies, because their application is painful.

Some of the evils of our country are known to exist, and the bad results that are caused by them are admitted, but the oppressors ask as

did "boss Tweed," when he thought he had New York City so thoroughly bound, that he could rob it at his pleasure, "What are you going to do about it?" It is not pretended that this question can be easily answered. It is easy to point out wrongs but it is not always easy to suggest remedies that are available and practical, yet proper remedies must be sought out and applied, or no good will be accomplished. The necessities for reform are so urgent and imperative, that some mode of reform must be applied or anarchy will triumph over law.

The evil which the framers of the constitution attempted to prevent, as has been shown, was an aristocracy based on large fortunes and estates, and since such an aristocracy has obtained in our country, and the evil results anticipated have been more than realized, and threaten more serious results in the future, it becomes an imperative necessity to remove the cause, or in some way to limit and restrict its influences. that it shall not disturb the peace and prosperity of, or remain a menace to the liberties of the people.

The means of accumulating collossal fortunes, should be limited by taxation.

The constitution provides "The Congress shall have power to lay and collect taxes, duties, imports and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." (*Art. 1 Sec. VIII. Sub. 1*) This enables a tax to be levied to obtain revenue, and for the general welfare of the country. The government always needs revenue, and when the general welfare requires the limitation of great estates, surely congress can levy a tax for that purpose, as well as "to provide for the common defense." Although it may be conceded, that it is within the authority of the states to levy all direct taxes, yet in the case of *Sholey* v. *Rew*, *23 Wall. 331*, it was held that the provisions of the international revenue laws, which impose a tax on every devolution of title to real-estate, was not a direct tax, but an excise tax authorized by the provisions of the consti tution" above quoted. It was also settled under that law, that congress had the authority to make laws, by which incomes could be taxed and that the rate of taxation could be increased as the amount of the income increased. Congress therefore has the authority, and it becomes its duty to lay a tax upon the income of the great estates of this country, so graded as to substantially absorb the income above a certain amount. What that amount shall be, may be somewhat difficult to ascertain, but earnest investigation, patriotic devotion to duty and a courageous determination to do right, ought to impel congress to find the correct

amount and to pass such an act in the near future. The limit herein contemplated, is not intended to be narrow, but it ought to be such that the country and the people will be saved from the oppression and danger of American aristocracy.

The transmission of all of the great estates, above a certain amount or valuation by will or by the laws of descent should be prohibited, and such parts of the estates should escheat to the government. The amount to be controlled by the owner, ought to depend upon the number of children and the amounts given to each of them in the life-time of the ancestor. It would require care, good judgment and study to fix the proper limit of transmission, but with the aid of these, the golden mean could easily be ascertained. Then, in a generation or two, the necessary result, which the fathers thought they had obtained, by prohibiting titles, would be reached, and no vast fortunes would be owned by any one person, and so no American aristocracy, based on such fortunes could remain in the country.

The transmission of property by will or by descent, is controlled by the laws of the several states, but the right of the general government, to regulate the whole matter cannot be seriously questioned. This appears by its constitutional right of taxation, and its right to prohibit perpetuities, and in a general way to graduate the burdens to be borne by the people, in the different walks and stations of life, also it possesses the inherent right of self preservation, and the right to do or prohibit those things that threaten injury to the safety of its citizens.

To some the remedies herein proposed doubtless will seem harsh. If the remedies are harsh, that could be no reason why they should not be applied. If the perpetuity and safety of the country is in jeopardy, every patriotic citizen would feel, that no sacrifice is too great or any self denial too severe to be withheld, when the safety of the country, or the happiness of the people require them to be made. It cannot be denied that a great evil exists, and that reformation is peremptorily demanded by the lower classes and the toiling millions. In this land of education, the people are intelligent, and fully appreciate the situation, and they thoroughly hate the assumption and arrogance of the aristocratic classes. They will not long brook the taunts and jeers, nor the insults and oppression of senseless millionaires who seek to lord it over them, simply because they are the possessors of great wealth, nor will the masses long submit to be ruled by the rich, simply because they have the means and are willing to buy positions of honor or power. The feeling of discontent and unrest is becoming general, and there is

much more of the spirit of resistance in the people than finds outspoken expression. Sometimes a Black Friday is forced on Wall Street by the money barons, and the people are made to feel how completely they are in the grasp of money kings, and they realize how easily and quickly the savings of years can be swept away by the speculators. Then for a time a murmur of discontent and insecurity is heard, but shortly it is hushed. Again government bonds can be secretly sold to some Wall Street broker, out of favoritism, and millions of dollars of the public money is absorbed in commissions by the barons. Then mutterings are heard, like the roar of a coming storm, but it soon dies away. In many places in this land of boasted civil liberty, the march of government troops has been heard of late. The army has been called out to impress the uprising of the laboring masses, caused by the tyranny and oppression of great corporations and wealthy individuals. Blood has flowed, and the strong arm of military power has been required to restore peace. United States district judges have caused men to be arrested and tried before them without the right of trial by jury, for contempt of court, when the accused had never seen the judge, nor had he in any way been brought under his jurisdiction. Thus the army and the courts have been used to hold the masses in subjection, when they have offered resistance to what they claim and insist, is the tyranny and oppression of the money power. Already the breach between the people and our American titleless aristocracy is too wide, but it is growing wider every day, and unless effective remedies are soon applied, anarchy must take the place of law, and constitutional liberty be forever driven from our land.

The spirit of discontent and resistance to wrong and oppression is natural and commendable, and all right minded men are glad this spirit of resistance is thoroughly aroused in the laboring masses, but they deplore illegal resistance. All good people have regretted that the strikes of organized labor, have been turned into lawless mobs, by the rash and senseless few, and often by those who were not members of any labor union. All such unlawful methods only tend to bring the labor organizations into disrepute, and make it possible for the manufacturing lords and soulless corporations to oppress their working bonds with doubled severity. Men are never warranted in breaking the law, when lawful redress is within reach.

The men who work for wages in this country, can protect themselves in a lawful way, if they will organize and move as a unit in a lawful way; by using the ballot, placed in their hands by the govern-

ment, for their protection. The toilers here are not an ignorant rabble, but they are, under our system of free schools, educated and thoughtful men, as they have shown by the thoroughness of their organizations, and if they will turn their unions into a lawful channel, they can soon have a majority of their representatives, in congress and the state legislatures, who will look after their interest. This is what the laborers most need for their protection, and such a result is undoubtedly within their reach. They control three fourths of the votes of this republic, and if their wrongs are not righted in a lawful way as herein suggested, the fault is their own, and they can blame no one but themselves.

The great difficulty in the past has been that the laborers have trusted and voted for those who have pretended to favor their interests, and when these have been raised to power they have proved traitors. "Eternal vigilance is the price of liberty." The wage worker and the poor, "should not trust in riches," nor should they ever promote to power those who have their price and can be bought. They should not listen to the sweet words of politicians and parties, but they should elect such men only who are well known for their ability and integrity, and who are pledged to represent their interests, and to enact such laws as prevent the existence of an American aristocracy, and an equitable division of profits earned by labor. If the desired reformation should be delayed, and men prove traitors, yet with patience and perseverence the good time and measures must come, for the safety of the nation demands them.

CONTRACTS OF SALE OF MERCHANDISE. FRAUD ON THE VENDOR.

HON. LEVI T. GRIFFIN.

CHARACTER OF STATEMENTS MADE. REPRESENTATIONS TO COMMERCIAL AGENCIES.

In a former article (May number JOURNAL) fraud in contemplation of law, or legal fraud was considered. It was contended that a false representation, though honestly made and believed to be true, afforded sufficient ground to the vendor for rescinding a contract of sale. We now propose to briefly consider character of statements made, with some reference also to representations made to commercial agencies. It may be regarded as within the common knowledge of the profession, that the false representation must be the assertion of a fact, and usually of an existing fact, although the fact may depend upon some practical test assumed to have been made. This question oftener arises, in cases of alleged fraud on the purchaser, and though we are treating of fraud on the vendor, we may refer to such cases as illustrating the subject. The fullest inquiry is permissible. Thus, where on a sale of milk cans, the defendant attempted to recoup damages by reason of the false representation of plaintiff, that the plaintiff had title to certain territory, in which to use the cans, evidence was admitted, that the plaintiff's agent represented that as soon as the defendant's creamery was completed, another creamery company then operating in the territory, would have to leave it. So also in the same case it is held that the agent's representation, which he knew to be false, that 600 cans would operate the creamery, was a good ground for damages, if damages resulted. *Davis* v. *Davis, 97 Mich. 419.*

It is obvious that the assertion, in reference to the 600 cans is considered as based upon the assumed knowledge of the agent ob-

tained by a practical trial, and therefor a representation of fact, and not a mere expression of opinion; for without a trial it could hardly be determined what number of cans would operate the creamery. There is a test that is always helpful, if not decisive, in determining how far a statement should be regarded as an assertion of fact of an actionable character, if false. Every person may be said to repose at his peril in the opinion of others, when he has an equal opportunity to form and exercise his own judgment. When the vendor has no superior knowledge, and the parties stand upon equal terms and the facts lie open to both parties, with equal opportunities and observation and examination, and the vendor honestly expresses his opinion, though it turn out to be incorrect, the buyer is not relieved from the application of the principle of *caveat emptor*. Thus on a sale of stock of goods the vendor's statement does not generally stand on the same footing as facts, even as to amount, quality, or value, when the purchaser sees or knows the property, or has opportunities to know it. *Collins* v. *Jackson*, *54 Mich. 186*. *Johnson* v. *Seymour*, *79 Mich. 156*. See also *Farrar* v. *Churchill*, *135 U. S. 609*. *Farnsworth* v. *Duffner*, *142 U. S. 43*. *Southern Development Company* v. *Silvia*, *125 U. S. 247*.

It may be observed that, unless under exceptional circumstances, statements of value, though incorrect, are not such assertions of fact as to constitute fraud. Yet it cannot be laid down as a rule of law that value is never a material fact. When it is known that the purchaser relies upon the superior knowledge of the seller, as to quality or value, the seller is bound to act honorably and deal fairly with the purchaser; when confidence is reposed in him he is bound not to abuse it; thus when a jeweler, knowing the purchaser's ignorance, designably defrauds him by false statements of the value of articles in his trade, which none but an expert could reasonably be expected to understand; so also representation of value made by the vendor of mining stock to one who knows nothing about the value of mining property, and relies on such representation; so also in the case of a purchaser of a mortgage on distant lands who relies on and is misled by representations made to him by the seller, as to the mortgagor's responsibility, and value of the security, even though honestly made and even though the seller had suggested to the purchaser that he look at the lands for himself, and had offered to pay the traveling expenses of the purchaser, if the lands did not suit, as their judgment might not agree. It is said that such a suggestion implies the assertion, that the seller has exercised an

intelligent judgment, and really increases the purchaser's sense of security therein. *Webster* v. *Bailey, 36 Mich. 36*; *Maxted* v. *Fowler, 94 Mich. 106; Picard* v. *McCormick, 11 Mich. 68.*

The representation must also be material. This is not made to depend upon any notion of materiality the vendor may have in his mind. Though the representation appears to the vendor to be material, it is not to be decided by him. If the materiality is disputed it is a question like many others, for the jury, and they must determine under the evidence and instructions of the court, whether the fact represented is or was really material, and it would be error to instruct the jury to find whether they were *deemed by the party* to be material. *Davis* v. *Davis supra.*

The representation itself need not be the sole inducement for entering into the contract. Various matters may exert an influence; but if the false representation operates as one cause of the sale, it is fraudulent, although the sale may have been mainly prompted by reliance placed on other matters. *Kirkendall* v. *Hartsock, 58 Mo. App. 234.*

It is hardly necessary to suggest that the vendor must rely in whole or in part, upon the false representation made, and some damage by reason thereof must accrue to him. And still further, it is essential that the means used should be successful in deceiving however false and dishonest the artifices, they do not constitute fraud, if the other party sees through them.

Thus far we have assumed that the representation is made to the vendor, but the existence of large commercial agencies cannot be ignored. They exist and are organized to collect information, as to the standing and pecuniary responsibility of merchants and dealers throughout the country. Their subscribers when applied to by customers to purchase goods on credit, invariably resort to the agency or to published lists, before yielding a favorable answer to the application. They are thus especially helpful to the jobber, to enable him to know when and to whom to give credit. They are supposed to have facilities at their command, to enable them to become familiar with the financial standing of the business class, and business men desiring credit make statements and representations, which are intended and calculated to secure it. It is usually true that upon the faith of such statements credit is not then asked of any particular person, but it is yet intended and understood, that such statements shall afford a basis of credit. These statements are now regarded in the law as in effect made to the person or persons

who rely upon them and give credit. *Genesse Bank* v. *Michigan Barge Co. 52 Mich. 164.*

There is however much to determine in connection with this question. The courts usually go no further than is necessary, to decide the particular case. Ordinarily the party suffering is a regular subscriber to the agency, but we conceive that it would make no difference, if the agency imparted him the information on special request, on any terms, or conferred it as a gift. But how if surreptitiously obtained through a clerk or employee, who was known to be violating his duty in imparting it? Do the methods or means of obtaining the information affect the question? Does the retail merchant who submits a statement of his business affairs for the purpose of giving him a standing and credit among his business men, run the hazard and risk of its use by any one who obtains it, and of whom he secures credit, relying upon it, or can it be insisted that he intended it only for the subscriber to the agency, of which he himself was one?

Again it has been forcibly remarked, that these agencies do not rely on what the merchant has stated as much as they do on the general information, respecting his financial status, which they are able to gather in the community. There is oftentimes a combination of the statement with what the reporters of the agency have been able to learn otherwise, so that when it reaches the foreign subscriber, it is a far different thing from an accurate transcript of what the home merchant has said. *Burchinell* v. *Hirsh 39 P. 352 (Court of Appeals of Colorado.)* There is a necessity therefore as the president judge well suggests, that the evidence should be confined to the actual representations made by the buyer, and it is these representations that must have been communicated to the vendor, and as made, must have furnished in whole or in part, an inducement to the vendor to part with his goods on credit.

Where a statement was made by a person to obtain a rating in the agency, though not for the purpose and with the intent that the same should be used to establish or obtain a credit for himself, the court held that he could not shield himself, from the effects of a business statement, behind a secret intention at the time of making the statement, that he would not profit by it. *Moyer* v. *Lederer 50 Ill. App. 94.*

An important question is: What are the obligations of the party making the statement, in case of change of condition as respect his financial affairs? The question has received some consideration in

Mooney v. *Davis 75 Mich. 188.* The majority of the court seem to hold, that if there had been any material change in his financial standing after the statements were made, he should have notified the agency to whom the information was given, that persons with whom he commercially deals may not be misled as to the credit they may safely extend. Some significance however is apparently given to evidence, claimed to show an approval of the statements recently before the sale in question. There is also a dissenting opinion, in which it is contended that a merchant who is visited by the agents, or *attaches* of a mercantile agency, and at their request gives to them a statement of the condition of his business, is not bound thereafter to notify such agencies of the financial or other changes in his business; nor is he obliged to inform them if afterwards he is on the verge of bankruptcy or unable to pay his debts. That if a merchant should seek out an agency, for the express purpose of building up a credit therein, the case might be different. But a merchant doing a business without regard to these agencies as he has a right to do, who is sought out by such agencies or their employees, and a statement demanded of him, and who in good faith frankly and honestly tells them his business condition, although under no legal obligation to do so, is not thereby bound forever afterward to keep such agencies informed of his financial standing, any more than he would be, had he made a statement to some person not connected with such agencies.

Mooney v. *Davis, Supra* is evidently somewhat modified by a later decision of the Michigan court, by which it would seem that a merchant is not bound to report his changed conditions to the agency, unless he knows or should know, that credit is extended upon the strength of his original rating, or unless he has or knows that he will become insolvent. *Courtland Manufacturing Co.* v. *Platt 83 Mich. 419.*

This particular matter is also referred to in *Burchinell* v. *Hirsh Supra.* In that case the jury was instructed by the trial judge, that if after the buyers had made his statement to the commercial agency, he found his financial condition altered, so that in some substantial respect his statement would not be true, he was bound to publish the fact of his insolvency; to which the learned justice, delivering the opinion of the Court of Appeals, remarks "There is no such responsibility," but it appears that the suggestion is rather intended to be confined to the facts of the particular case then before the court.

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NOTES.

With this number of the LAW JOURNAL we present a very readable and interesting article on the attitude of the federal judiciary towards the people and the second of the promised articles of Levi T. Griffin. We trust these articles will especially attract the attention they merit from the bar of the state.

In the May number of the Chicago Law Journal appears the report of a case in which a novel question in the law of divorce has arisen and has been decided. It is a case started in the circuit court of Cook County, Illinois, but it will be reviewed by the appellate court. It is the case of Emelie Groth v. Heinrich Groth, and decides that under certain circumstances the husband is entitled to alimony and attorney fees at the suit of his wife praying divorce.

In the opinion there is a statement that the husband is an invalid and without resources, that the right of the wife originally to alimony, was under the common law theory that the husband controlled the property of both. The reason has long since in most cases failed, but the practice still continues it. Here the wife alone had property and the old reason extended as it was to later practice is applied in certainly a peculiar way. Will it stand?

An important point was decided about a month ago in the supreme court of New York in the case of *Edmund W. Converse et al.* v. *Sheriff of New York*. It has been decided in the same way at various other times, but its reiteration will prove of interest to some people. A syllabus of the case is as follows:

A merchant who gives to a mercantile agency a statement of the financial condition of his business, does so with knowledge that it may be communicated to subscribers, and that it is obtained for such purpose. He thereby makes the agency what may be called a per-

missive agent for the imparting of the facts to whomsoever may be rightfully entitled to the information. It makes no difference in principle if the information be given a subscriber who shall rely thereon, by communication other than from the agency direct.

While it is true that the congress whose labors have just ended, may justly be called the "do nothing" congress, yet the people may well rejoice that certain measures failed of passage. One measure of the utmost importance to the commercial and manufacturing interest of the country, stained by the red hand of anarchy, and aimed at the national judicial system was one of these measures.

It was a bill giving a right to trial by jury in contempt proceedings. If this bill had become a law it would have so revolutionized the judicial system, that courts, would become the most contemptable of all governmental instrumentalities.

The truth of this assertion is at once apparent when we come to behold the farcical spectacle of a court having to fall back upon the judgment of a jury to say whether or not one of its injunctional orders had been violated.

It would not only be nigh impossible to obtain a conviction, but it would tend to impair in the estimation of the public the value of the administration of justice. If congress had such a jealous regard for the interests of strikers, then they should have established an arbitration board, or else deny absolutely the right to issue injunctions in certain cases, instead of holding courts up to the ridicule of the lawless.

When the power to issue an injunction is preserved, the right to punish summarily in the discretion of the court, or without the intervention of a jury, as implied. This is the rule of the common law, and was so at the adoption of the constitution.

Courts have repeatedly held as unconstitutional all acts which tended in any way to curb their powers in contempt proceedings. *State* v. *Frew*, *24 W. Va. 416*. *Ex parte Robinson*, *19 Wall. 505*. *Hughes* v. *People*, *5 Col. 436*. *People* v. *Wilson*, *64 Ill. 195*. *Batchelder* v. *Moore*, *42 Cal. 415*. *Arnold* v. *Comm. 44 Am. Rep. 480*.

In *ex parte Robinson*, Mr Justice Field says: the power to punish for contempts is inherent in all courts; and then adds that its existance is essential to the due administration of justice.

In *Hughes* v. *People*, *5 Col. 436*, it was held that the right of self-preservation is inheront in the courts; the power to punish for contempts, is an incident to all courts independent of statutory provisions.

"Cases of contempt of court were never triable by jury, and the object of the power would be defeated in many cases if it were. The power to punish contempt is incident to courts of record." *Cooley Con. Lim., page 389*. This doctrine has been upheld by a long line

of authorities. The moment the courts of the United States were called into existence, they became invested with this power. *Ex parte Bollman, 4 Cranch 75.*

It was wisely said in *Eaton* v. *The State, 39 Ala. 552*, that "The power to punish contempts by fine and imprisonment is incident to all courts of record, and without such power, the administration of the law would be in continual danger of being thwarted by the lawless.

In speaking of contempts, Chancellor Kent says: "The trust is giving to the courts, not for themselves, but for the public, who are deeply interested in the preservation of this power in its accustomed vigor. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees, without the intervention of a jury, would be a disgrace to the legislation and a stigma upon the age which invented it. In this country all courts derive their authority from the people, and hold it in trust for their security and benefit Judges are elected by the people and hold their authority in a double sense, directly from them; the power they exercise is but the authority of the people themselves, exercised through courts as their agents. It is the authority and laws emanating from the people, which the judges sit to exercise and enforce. Contempts against these courts in the administration of their laws are insults offered to the authority of the people themselves and not to the humble agents of the law, whom they employ in the conduct of their government.

The power to compel the lawless offender against decency and propriety, to respect the laws of his country, and submit to their authority (a duty to which the good citizen yields hearty obedience, without compulsion) must exist, or courts and laws operate at last as a restraint upon the upright citizen who needs no restraint, and a license to the offenders, whom they are made to subdue. A bill of this kind would certainly have the effect to increase strikes. Such would be the result when strike leaders thought they could demand a jury trial and thus throw themselves upon the sympathies of the jurors. As strikes are alike disasters to employer and employee, any legislative enactment intended to encourage them should be severely condemned.—*Robt. T. Speed.*

BOOK REVIEWS.

AMERICAN PROBATE REPORTS, VOL. 8.—Containing the cases of importance decided in the Highest Courts of the several States on points of Probate Law. By A. A. GREENHOOT, New York. Baker, Voorhis & Company. 1896. Vol. 8. 748 pages. Price $5.50 net.

The American Probate Reports consisting now, with the publication of this last report, of eight volumes of carefully assorted cases relative to the Probate Laws of the several states, has become a valuable work in its line. Mr. A. A. Greenhoot, a member of the New York Bar, is the author and compiler of these reports, and his efforts have been expended, to use his own expression, in gathering together "the Cream of Probate Law."

In a series of reports such as these, confined as they are to those cases selected especially for their bearing upon this particular branch of the law, we are enabled the more quickly to locate the latest decisions on any matter which may arise. And in this respect, these reports not only serve their purpose in reporting the cases from the courts, of most general interest and importance in Probate law, but also, with their exceptionally full and minutely classified index and explanatory foot-notes, they present to the reader many of the advantages which might be derived from an exhaustive treatise on this subject.

MAUPIN ON MARKETABLE TITLE TO REAL ESTATE.—Being a treatise on the Rights and Remedies of Vendors and Purchasers of Defective Titles, including the Law of Covenants for Title, the Doctrine of Doubtful Title, of Specific Performance, and other kindred subjects. By CHAPMAN W. MAUPIN. New York: Baker, Voorhis & Company, 1896. 850 pp. $6.50 net.

As will be readily observed from the foregoing title and the statement of the subjects therein discussed, this is a book which is peculiarly original and unique in its aim and purpose.

It is a treatise, written by Chapman W. Maupin of the Washington, D. C., bar, in which is discussed the law relative to title to real property, as that law is applied between vendor and purchaser. It must in no way be considered as a treatise on Real Property, in the ordinary acceptation of the term, nor should it be confused with the numerous text-books which have been written relating to "Land Titles." It is a live, practical, and up-to-date treatise on the rights and remedies of both purchaser and vendor where defects in the title have been discovered.

The word "marketable," or rather its negative as used by the

author of this book, is a term applicable to all defective titles, whether they be absolutely bad or merely doubtful; and therefore, the author deems it not at all inconsistent to treat under this title such subjects as Covenants for Title, Estoppel, Action for Damages, Right to Perfect Title, and others which would ordinarily pertain to a treatise on "defective titles."

There are many good features which would commend this book to its readers. In the first place, from a mechanical stand-point, it is well put together, with a durable binding, fine leather cover, clear print, and what is most essential in text books, a well arranged and complete reference index covering the whole text.

As to the literary merits of the book there can be no question. The subject matter is discussed in a logical order, interspersed with many explanatory foot-notes, and abundantly supported and strengthened by an unusually large number of cases. And above all, it is a work which stands practically alone in the discussion of a branch of the law, which has perhaps been the source of more disputes and litigation than any other subject. And in concluding, it is but the justice due to the author to say that he has covered the subject in an able and scholarly manner, and has given to the legal profession and to those investing and dealing in real estate, an invaluable book and one deserving of their appreciation.

RECENT MICHIGAN DECISIONS.

AGENCY—RETENTION OF COLLECTIONS BY AGENT—EVIDENCE—INSTRUCTION TO JURY.—Action brought to recover a claim presented for certain sums alleged to have been retained by defendant while acting as claimant's agent in collecting certain rents. It was claimed by defendant that one of the tenants, being behind with his rent, executed his note to defendant who endorsed and negotiated it and gave claimant credit for the money, which claim, before the death of claimant, was recognized by him. After the execution of the notes, the tenant sold his business and a portion of the money received was used to take up these notes.

The court properly left to the jury the question, whether defendant had advanced amounts to claimant for the tenant under circumstances which made the tenant his debtor, instead of claimant, and directed them to find a verdict for the claimant if such was the case, and also, that if so, defendant had no right to reimburse himself for such advancements out of other rents, subsequently collected, but was in error in instructing the jury that if they found that when the tenant sold his stock and a certain sum was paid on his rent, then such payment should be applied upon claimant's rent and not upon the indebtedness, if any such existed, due as agent, the defendant, from the tenant. *Wilson* v. *Crosby*. (May 26.)

BOND—DECLARATION—DEMURRER.—A party having refused to accept an offer of trial on the merits of an action after the overruling of a demurrer to the declaration must be deemed to have waived the right.

The fact that a bond given is conditional to pay a judgment of a court or to prosecute an appeal to effect does not militate against its validity as a common law bond.

In an action upon a bond, given upon appeal the averments in the declaration being sufficient to show a good common law bond, the question as to whether the circumstances under which it was given were such that there was no consideration for its execution, cannot be raised by demurrer.

It is not necessary in declaring on a bond to aver delivery, particularly where profert is made.

The defense of a want of consideration can not be made unless the defendant give notice thereof with his plea to the general issue. *Boyer* v. *Sowles et al.* (May 26.)

CONSTITUTIONAL LAW—CONSTRUCTION OF ACTS RELATIVE TO PLANK ROAD COMPANIES—PROPER PARTIES—JURISDICTION OF CHANCERY COURT.—The defendant company was organized under an act approved Feb. 7, 1857, by which the Detroit & Erin Plank Road Company, incorporated under act approved March 18, 1848, and the Erin and Mt. Clemens Plank Road Company, incorporated by act of March, 20, 1850, were consolidated into the Detroit & Erin Plank Road Company.

Feb. 12, 1855, an act went into effect, amending the act of March 18, 1848, permitting the substitution of gravel for plank, specifying the depth it should be laid and that the gravel should be screened. Ten days after the companies consolidated an act was passed changing the proviso in regard to the depth at which the gravel should be laid and omitting the words "which shall be properly screened." This act was again amended by act approved May 23, 1879, again changing the depth at which the gravel should be laid and requiring the dirt, stones and sand of one and one-half inches to be sifted out and removed.

It was contended that this amendment is void being an attempted change of the charter of the company, imposing additional burdens upon the company that had not been assented to by the company as required to effect a change in its charter.

Held: 1, That the provisions of the act of Feb. 12, 1855, required no written assent on the part of the company. Its action in making the substitution was an acceptance of the conditions as to the quality of the gravel. So far as the company

acted under the proffer, it must comply with the conditions.

2. The provisions of the act of May 23, 1879, requiring that the gravel used must be sifted so as to remove all dirt, sand and stone over one and one-half inches in diameter was such a future police regulation, that the charter of the company made in 1848 must be, when made, regarded as subject to.

3. It was within the power of the legislature to amend the charter of the defendant company in relation to the construction of its road, after the expiration of the thirty years during which no amendment could bind the company unless assented to by it.

4. The determination of the gravel to be used is the exercise of a legislative function and not a judicial discretion.

5. The provisions of Act No. 144, approved May 17, 1877, and the subsequent enactments affecting the provisions of that act, imposing duties upon the highway commissioner and township must be held police regulations applicable to the defendant company.

6. The township and its authorities upon whom are charged the duty of seeing that the road is kept safe for the traveling public, have such an interest in the matter, the bill being filed to enjoin the creation of a threatened nuisance, dangerous to the traveling public, as makes them proper complainants to the bill. *Detroit & Erin Plank Road Company* v. *Macomb Circuit Judge.* (May 19.)

CONVERSION—JOINT TORT-FEASORS—TRIAL—EVIDENCE.—Where one partner, through false representations, induces another to sell goods to the firm, which goods are afterward fraudulently disposed of by the partner, the members of the partnership are jointly liable.

Even if the parties were not partners, but joined in and knowingly assisted in the fraudulent disposition of the goods, all would be jointly liable although only one was directly benefited by the transaction.

When a court attempts to state to a jury the substance of the testimony of a witness, it should state that which supports the theory of the one party as well as the other.

Testimony offered by the plaintiff in relation to a statement made to him by his credit man as to representations made by the vendee at the time of the sale was competent as tending to show that the vendor knew what the false representations were, and relied upon them in making the sale. *Banner* v. *Schlessinger, et al.* (May 12.)

DEFECTIVE HIGHWAY—CONTRIBUTORY NEGLIGENCE—INSTRUCTION TO JURY.—In an action brought to recover damages sustained by reason of a defect in a highway, it appeared that plaintiff's son had previous knowledge of the defect, having passed it earlier in the day.

Held:—That an instruction to the jury that left the question of contributory negligence to rest upon the fact of the boy's having the defect in mind at the time of the accident, thereby leaving the jury to infer that it was not negligent to omit to bear the defect in mind, was erroneous.

It should have been left to the jury to determine whether the defect was such that a prudent man would have born it in mind. *Bouga* v. *Township of Weare.* (May 26.)

FORTUNE TELLING—PROOF OF OFFENCE—INSTRUCTION TO JURY—EVIDENCE.—One, who by advertisement to the public, holds himself out as possessing supernatural powers and represents that he is enabled to reveal future events that would occur to people, forwarning them of danger and of circumstances that would certainly occur, is properly convicted of being a disorderly person within the meaning of the provisions of Sec. 1, Chapter 5, 3 How. Stat. in that he pretended to tell fortunes.

2. In a prosecution for a misdemeanor, where the facts are admitted or undisputed, it is the duty of the court to instruct the jury that the fact proven constitute the offense.

3. The offense being a continuing one proof of any acts to sustain the general charge was admissible. *People* v. *Elmer.* (May 26.)

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—In an action against a railroad company for injuries received through the alleged negligence of the company in furnishing an inferior grade of oil for lantern use, it appearing that the employe, claiming to have known for a period of over two months that the light upon which his safety depended, was not satisfactory and that it was the fault of the oil and not

the lantern, continued to use the oil without complaint, he must be held guilty of such contributory negligence as to defeat recovery. *Huffman* v. *Michigan Central Railroad Company.* (May 12.)

SLANDER OF TITLE—MALICE—EVIDENCE—LIMITATION OF ARGUMENT.—Recovery cannot be had in an action for slander of title unless it be shown that the assertion made was false and was uttered maliciously and with intent to injure the plaintiff.

It is not actionable for a man to assert his own rights at any time, and where the defendant fails to prove such right upon investigation, still, if at the time he spoke, he supposed in good faith such rights to exist, no action lies.

The malice in fact must exist at the time the words are spoken and it would, therefore, be competent for the defendant to show that he was mistaken as to the facts or that he had forgotten facts previously known to him.

It was error for the court to limit the argument to ten minutes on a side. *Harrison* v. *Howe.* (May 26.)

SURETYSHIP—COMPLETENESS OF BOND—LIABILITY OF SURETY—ESTOPPEL—SUPERVISORS.—Where a surety intrusts an official bond to another to deliver upon a promise that others shall sign as sureties he is afterwards estopped to deny his liability even though the additional surety is not obtained if the bond in its structure does not apprise the official whose duty it is to act upon it that it is incomplete

The fact that a blank line with the word "surety" is left under the signatures to the bond, is not sufficient notice of the incompleteness of the bond.

Procuring sureties to a town treasurer's bond is no part of the duties of a Supervisor. *Township of Crystal Lake* v. *Hill, et al.* (May 12.)

WARRANT OF ATTORNEY—LIMITATION OF POWER TO CONFESS JUDGMENT—OBSCURE JUDGMENT.—An obscure judgment entry may be construed by a reference to the caption, record or pleadings.

A warrant of attorney which purports to give authority to confess judgments in courts beyond the limit of the State where the instrument is executed, will be held valid as to judgments confessed within the State where the warrant was executed.

Sections 5035 and 5060 of the Ohio Statutes, precluding a judgment except upon the filing of a verified petition and issue of summons, cannot be construed to apply to a case where the warrant expressly permits judgment without process. *First National Bank* v. *Garland et al.* (May 26.)

WARRANTY—EVIDENCE—BILL OF PARTICULARS—INSTRUCTIONS TO JURY.—In an action to recover damages for breach of warranty on the sale of a horse, it was not error to allow an amendment to the bill of particulars setting forth the expense of taking the horse away for treatment.

2. The action being in assumpsit for breach of a contract, an inquiry put to defendant as to whether he had undertaken to deceive plaintiff, was properly excluded.

3. An inquiry by defendant's counsel for the purpose of showing what offer had been made by defendant in a negotiation to settle, was properly rejected as being a mere matter of compromise.

4. It was not error to admit testimony as to the value of the horse, the witnesses having shown a sufficient knowledge of the market to entitle them to speak upon the subject.

5. A hypothetical question should not be based "particularly" on the testimony of a portion of the witnesses.

6. Where one purchases a horse with a warranty of soundness, paying a portion of the purchase price down, and before the delivery of the animal observes that it is lame, he is not procluded from accepting the horse and relying upon the warranty. *Connell* v. *McNett.* (May 19.)

CURRENT LITERATURE.

The *North American Review* for June is as usual crowded with the best of current literature. To thinking men, to lawyers, here always will be found food for thought. Its leading article is from the pen of Andrew Carnegie and is entitled "The Ship of State Adrift." With characteristic bluntness Mr. Carnegie points out the retrogression of the United States since 1890 in national wealth and commercial prosperity and finds our natural resources and advantages over other nations remaining unchanged—the cause to be the legislation which has injected silver into the currency thereby weakening confidence at home and abroad.

A succinct exposition of the "Progress of Theosophy in the United States," is given by Mr. E. T. Hargrove, the new President of the Theosophical Society in America.

In "Environment and Man in New England," Prof. N. S. Shaler presents a remarkable and thoughtful study of New England characteristics.

This number is the last of the 162 No. Volume.

The "*American Magazine of Civics*" for June contains many timely articles containing suggestions for good along many lines. Its field is the concerns of civics and good government, good citizenship, right and social order. It covers a large field in a worthy manner.

The *Atlantic Monthly* for June presents a continuance of Henry James' story "The Old Things" as a leader. "The 'Bird of the Musical Wing' " by Olive Thorne Miller, is a very pretty recital of the history of a humming bird's nest and the hatching in it of the young birds. It is a beautifully written sketch of an unusual sight. There appears also the second part of D. G. Rosetti's letters, "In a Famous French Home" a description of a visit to the old home of George Sand. A historical sketch interesting to Americans is an account of Lord Howe's Commission to Pacify the Colonies written by Paul Leicester Ford. A clever story is "The Price of a Cow" and several other articles and the department "Comment on New Books" makes up an interesting number. Perhaps the best article of all is Francis A. Walker's article advocating "Restriction of Immigration."

For the latest advances in science along all lines Appleton's *Popular Science Monthly* is the best magazine with which we are acquainted. The articles are usually short but right to the point. In the June number for instance there are thirteen original articles on important discoveries and other scientific topics and three departments which as usual are very interesting. David Wells' article Part II. "Principles of Taxation" is the leading one in this number. "How the great Lakes were Built" by J. W. Spencer is of peculiar interest to people living in this vicinity where all are more or less acquainted with the character of the great lakes. How they grew and how from ancient great rivers they became great lakes is a subject one would think almost impossible of conjecture but in this article we feel we are not reading conjecture but theories fortified by strong arguments; before a jury it would be called evidence and their verdict would be "facts." An article original in arrangement only is one opposing the extension of the metric system and many good reasons are well urged. A clever article entitled "Why Progress is in Leaps" might better have been entitled "A Review of the World's Scientific Progress." It shows in a few words what has been accomplished along the line of invention and discovery.

The *Metaphysical Magazine* for June contains several articles along the line of though suggested by its name. Among others the "Socratic Method of Instruction" is interesting and contains several suggestions which can be usefully employed in our higher schools. The leading article of the number is a sketch entitled "The Rosicrucian Brotherhood."

Public Opinion deserves especial praise for its department of American Affairs and the *Review of Reviews* deserves even more credit for its editorial department "The Progress of the World." The latter is in all respects original in its language and deductions and shows the work of a brilliant, educated and thoughtful mind. There are two very interesting articles in the June number of the *Review of Reviews* on Alaskan subjects, one "The Alaska Gold Fields" the other "Sheldon Jackson, Alaska's Apostle and Pioneer." Another article of interest is "The Peoples Food, A great National Inquiry." "Nicholas II. The Czar of Russia," "The Franco-Russian Alliance" the latter by the Baron de Coubertin, the usual departments and an article on St. Louis makes up a very readable and instructive number.

A review of the issue of June 18th of *Public Opinion* will give as good an idea of what is to be found in that excellent weekly, as could be given by a review of all the numbers of the month. At the top of the front cover page is a sentence: "During the presidential campaign *Public Opinion* will be found especially valuable as a means of obtaining absolutely unbiased news and comment on all sides of every important topic." With all respect to the paper we feel that as the body of the news consists of the carefully selected clippings from the leading papers of the country such news and comment cannot be called "absolutely unbiased" but we will say that the items are so well selected as to present the arguments to be urged on the various sides of a question in an unbiased manner. Here are to be found arguments on both sides of mooted questions, selected not for the purpose of making one or the other opinion prevail but with a view to letting the public weigh and judge for itself. Under the head of American affairs is a discussion of the presidential campaign, Democratic State Conventions, the color question at St. Louis, an article from the June Century containing a strong gold argument, and one condensed from the June North American Review with a tendency to favor silver as a money metal, under title of "The Outlook for Silver." Comments on the end of the 54th Congress; on the greater New York Charter Commission and a condensation of "The Future Supply of Anthracite Coal" by William Griffith in the Bond Record for June. All these subjects are well selected, and the department contains nothing which is not very interesting. Foreign Affairs department contains a short condensation of the doings of the recent Congress of the British Chambers of Commerce of the British Empire, clippings showing the present status of the Manitoba School question and other issues of Canadian politics, and a clipping from the Philadelphia Ledger on Cuban Belligerency.

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REFRESHING THE MEMORY BY IMPEACHING QUESTIONS.

W. A. COUTTS.

Obviously the first requisite for a just decision upon any subject of controversy, is a proper understanding of the facts involved in the controversy. The failures of our courts to equitably adjust disturbed legal relations, results more frequently from inadequate apprehension of the facts, than from failure to apply right principles to known facts. Could the machinery of judicial procedure be so perfected, that it would successfully perform its function of sifting truth from error, the law would seldom fail to apply an antidote to infringements of rights as recognized by the common sense of mankind.

Unfortunately, however, the legal cerebrum often fails in its attempts to "know the truth." Neither judges nor jurors have any means of weighing testimony with unerring accuracy; the perceptive faculties of witnesses vary so greatly that even though of equal veracity it is impossible to determine what credence should be given their varying statements. Not only is it impossible to measure with absolute precision the value of evidence procured from a witness, but it is often impossible to elicit from him evidence of facts once within his knowledge, but now forgotten, or to compel an unwilling witness to disclose matters material to the issue of which he alone is cognizant; while even in cases where evidence has been fully and fairly educed, and seems upon careful and candid review to establish

the demand of the plaintiff, that demand is liable to be defeated through the artful representations of the evidence to the jury, by counsel skilled in making the worst side appear the better. Thus rules of evidence more conspicuously than rules of substantive law fall far short of accomplishing their object.

The fault may sometimes be with the rules of evidence as well as with the natures of men. Nevertheless the attempt to modify or reform rules of evidence, which in practice have been found to work hardship, has in many cases been futile. Sometimes indeed, it has given rise to rules which carry inconsistency upon their face, and which work greater hardship than the rules sought to be improved. As an instance of such rules we submit the following:

"For the sole purpose of refreshing the memory of one's own witness, counsel may ask him on his direct examination 'if he did not at a prior date state certain facts which are not consistent with his present statements.' "

The rule is thus broadly and badly stated by Underhill in his recent work on evidence,[1] but in this form finds little support in the decisions of the courts. An examination of the cases which he cites to sustain it[2] shows that, although the proposition is laid down in them in much the same way as by Underhill himself, yet in laying it down the courts were influenced more by a view of the evils incident to the rule that a party may not impeach his own witness, than by any adequate consideration of the reasonableness of the proposition, or of the consequences likely to follow its adoption. Full consideration will, we think show, that although injustice may often result from the rule against impeaching one's own witness, and although that rule, as was shown by Benthan,[3] seems very ill founded in reason, yet compared with that quoted from Underhill, it has the advantage in consistency.

The rule as stated by Underhill would practically do away with all limitations recognized upon what may be used for the purpose of refreshing the memory of a witness. The rule is laid down without any qualifications whatever. According to it a witness, to refresh his memory, may be referred to any previous statement he has made which does not agree with his evidence in court. This proposition is evidently inconsistent with principles ordinarily recognized as governing a party in seeking to refresh the memory of his witness.

1. Underhill Evidence, p. 474.
2. State v. Cummins, 76 Iowa, 133. Louisville & N. R. Co. v. Hurt, 13 S. R. 180.
3. Rationale Judicial Evidence, vol. 2, chap. 4, pp. 59, 60, 63, 77, 78.

Authorities generally agree that writings unless competent as independent evidence can be used to refresh the memory only when made at or about the time of the occurences to which they refer. The reason for this is obvious. The witness must testify from his recollection of the events, not from inferences drawn from the writings, otherwise their use to refresh his memory unless made at a time such as would raise a presumption of their accuracy. If then, it is merely the memory of the witness that is at fault there is no reason for relaxing the rule in favor of writings or oral statements made by the witness himself. Only such statements as were made at a time or under such circumstances as would raise a presumption in favor of their accuracy, could consistently be held competent to refresh his memory. Even when a statement has been made in writing at the time when the events to which it speaks occurred, a copy of such statement can not be used to refresh the memory of a witness.[1] How then reconcile the exclusion of writings that do not conform with the principle above referred to with the rule which Mr. Underhill sets forth.

The rule has been somewhat differently stated by some of the courts which recognize it. The inconsistency which Mr. Underhill does not seem to notice, has been avoided by drawing a distinction between cases where the witness merely fails to give evidence as expected, and where he goes further making statements damaging to the party calling him.[2] In the latter class of cases the witness is more frequently treacherous than in the former. His damaging statements are better evidence of antagonism than is the mere failure to state what the party calling him expected him to state. Accordingly most of the courts that have recognized the rule at all limit its application to the latter class of cases.[3]

In such cases there is less danger of collusion between counsel and his witness, there is less danger that the witness will testify, not from his recollection, but from the suggestions afforded by the matter by which it is sought to refresh his recollection. If the wit-

1. Jones v. Stroud, 2 C. P. 196. Steinkeller v. Newton, 9 C. & P. 313. Springgarden Insurance Co. v. Riley, 15 Md. 54.

2. American & English Enc. of Law, 813. Melhuish v. Collier, 15 Q. B. 878. Reg v. Williams 6, Cox C. C. 343. Dunn v. Aslett, 2 M. & Rob. 122. Hemingway v. Garth, 51 Ala. 530. Campbell v. State, 23 Ala. 76. Griffith v. State, 90 Ala. 583. McNerney v. Reading, 150 Pa. 611. Hurley v. State, 46 O. St. 330. Hall v. Chicago R. R. Co., 84 Ia. 312. George v. Triplett, 63 N. W. R. 891.

3. Hurley v. State, 21 N. E. R. 645. Humble v. Shoemaker, 70 Iowa 233, 30 N. W. R. 492. Bullard v. Pearsall, 53 N. Y. 230. Mulhuish v. Collier, 15 Adal. & E., N. S. 878. State v. Sorter, 34 Pac. Rep. 1037. Hickory v. U. S. 151, U. S. 303, Greenleaf on Evidence, 442. 444 A. Note: Picker v. Bryant, 92 Mich. 430.

ness exhibits hostility to the party calling him, there is little danger that under pretense of having refreshed his memory he will echo back as original evidence matters of which he had never been cognizant. In such cases then there is not the same cause for vigilent scrutiny when a party attempts to refresh the memory of his witness. Indeed if the witness were really adverse, the opposite party could have no fear of collusion. No suggestions, no matter that could be placed before him would induce him to manufacture evidence for a party against whom he was prejudiced. It is clear then that in such cases the usual reason for restricting a party in his attempts to refresh the memory of his witness do not apply.

But as we shall see that the courts that have made the above distinction in avoiding one inconsistency have fallen into a greater. Although the usual danger attending refreshing the memory, need not be guarded against in these cases, it by no means follows that impeaching questions are legitimate for that purpose. Surely, if a question is objectionable as tending to impeach, it does violence to all reason to hold it competent for the purpose of refreshing the memory, unless it is reasonably calculated to achieve that purpose. Even though a question may have some tendency to refresh the memory, that is not enough. If it is otherwise incompetent it should surely be excluded where the circumstances disclose that a competent question equally designed to refresh the memory can be asked. In the instances under consideration if counsel really desires to refresh the memory of his witness, he can always do so more effectually by avoiding than by using questions reflecting on his veracity. If so, the rule which permits such questions can not be good law.[1]

Take a typical case; to establish his client's claim it is necessary for counsel to prove a contractual relation between the adverse parties. His client has one witness, the only apparently disinterested witness to the facts which it is expected will establish a contract. Interviewing the witness preparatory for trial, counsel obtains from him a statement showing that the adverse parties made promises to one another constituting the legal requirements of a contract, in his presence at a certain time and place. At the trial this witness instead of testifying according to his previous statements affirms the

1. For authorities holding such questions incompetent see: Commonwealth v. Welch, 4 Gray, 535; Sanchez v. The People, 22 N. N. App. 147; Bull N. P. 247; Ewer v. Androse, 3 B. & C. 746; Stockton v. Demouth, 7 Watts, 39; Smith v. Price, 8 Watts, 447. These cases hold that such questions can not be asked at all, forbidding them equally for the purpose of refreshing the memory and for impeachment.

very opposite. He says he was present at the time and place in question, heard the conversation between the adverse parties and is confident that they never came to any agreement.

Here clearly the witness is adverse; he has given damaging testimony against the party calling him, well knowing that he was relied on to give favorable testimony. In a case like this it is held competent by some authorities to ask the witness, for the purpose of refreshing his memory, if he has not made the statement which his evidence contradicts, although most of the same authorities take particular pains to declare that such question is not competent for the purpose of impeachment, and that independent evidence showing that witness had really made the alleged inconsistent statement can not be introduced.[1]

It is seldom that courts give forth in the same breath propositions so manifestly incongruous. They are all but mutually exclusive of each other. How can we regard the witness as adverse and at the same time assume that it is his memory that is at fault. If adverse, the attempt to refresh his memory, even were it to succeed, would be unavailing, for he would not admit the truth unless entrapped into it; to intrap him would be to discredit him; that is, to do what the authorities in question declare it is not competent to do.[2]

But, having in mind these incongruous propositions, what will counsel do when a witness upon whom he has relied proves treacherous, and gives evidence directly contrary to his former statements? He has a choice of two lines of action. Although he perceives that the witness is his foe and alert, he may affect not to notice that fact, and proceed, in defiance of reason and common sense, to treat him as if his treachery wore but a symptom of forgetfulness. Knowing that calmness and composure are the first requisites for the effective exercise of the reflective powers of the mind, counsel will carefully

1. People v. O'Neill, 65 N. W. Rep. 540. (Mich. 1895). State v. Cummins, 76 Iowa, 133.

2. The implied declaration that an adverse witness will voluntarily admit the truth when brought to his recollection, is one among many examples of absurdities into which courts fall in seeking on the one hand to avoid the injustice which would follow a strict adherence to established rules of law and on the other hand to avoid expressly overriding these rules.

As illustrated above, the rule that a party may not impeach his own witness would often defeat a just demand, hence a clear exception to this rule has been made by many authorities in the case where the witness is adverse. Johnson v. Leggett, 28 Ks. 605. National Syrup Co. v. Carlson, 42 Ill. App. 178. Miller v. Cook, 127 Ind. 339. Smith v. Briscoe, 65 Md. 561. Moore v. Chicago R. R. Co., 59 Miss. 243. Dunn. v. Dunnaker, 87 Mo., 600. Rex. v. Oldroyd R. R. C. C. 88. Wright v. Becket, 1 Me. Rob. 42. Dunn v. Asett, 2 Me. Rob. 122. State v. Norris, 1 Hayes, N. Cor. 429. Selover v. Bryant, 54 Minn. 484.

avoid discomposing the witness. He will say nothing to intimate that he suspects him of lying, he will refer him to the occurrences upon which he desires testimony. He will recall to him the time and place of their happening, and as far as possible all images of facts which have been associated in his mind with that which he desires to elicit. He may ask the witness if the facts are not so and so, (reciting the very words of his former statement;) but so long as he desires in solemn seriousness to continue the pretense of refreshing his memory he will refrain from asking any question which to third parties might appear to reflect upon his veracity, but on the other hand, counsel perceiving that the malady which afflicts the witness is not forgetfulness, but malignant mendacity, he may desire to administer a remedy for the latter ailment. But the courts in his jurisdiction have declared that such remedy can be applied only to diseases of memory. This however, in no way disconcerts him. He understands the difference between the theory and the practice of courts. He knows that although nominally they have confined their prescription to a disorder upon which it can not have the slightest possible effect, unless it to be to aggravate it, they yet hold it competent to apply it indiscriminately to all disorders so long as they bear the proper label. When therefore counsel observes in his witness symptoms of lying, treachery and combativeness, he hastens to donominate these distempers mere forgetfulness, that he may be permitted to forstall the mischief they are sure to work. In a tone of fierce invective he addresses his renegade witness. He hurls at him a volley of questions, each calculated to lay bare his treachery to court and jury, yet each, as if out of mingled iron and deference for legal fiction, carefully prefix by the phrase "By way of refreshing your memory."

It is apparent without further elaboration that any experienced and reputable lawyer by interrogating his witness upon alleged statements inconsistent with his evidence, for the avowed purpose of refreshing his memory, could very easily discredit him to the extent of convicting the jury that he had made the statements in question and that his evidence was presumptively false.

But on the other hand some courts have sought to avoid the hardship which the rule against impeaching one's witness entails when such witness is treacherous, yet at the same time to uphold the rule and have laid down the foregoing absurd proposition.

Not only could a party discredit a corrupt witness, but he could in like manner discredit one not corrupt. For in casual conversa-

tion a truthful person may occasionally make statements which deliberate reflection would induce him to modify or retract, and in such cases the rule permitting questions reflecting on the veracity of the witness, under the plea of refreshing his memory, would enable unscrupulous counsel to practice the most contemptible artifice under the shield of the law. In jurisdictions where this rule is recognized, that forbidding impeachment of one's own witness, while nominally maintained, is really rendered nugatory, while the reason assigned for permitting the questions which in spirit override that rule is but a fiction.

THE ADMISSION OF TESTIMONY FROM A FORMER TRIAL WHEN THE WITNESS IS ABSENT.

GEORGE KRONKE.

One of the many disputed questions in law arises out of the very frequent occurrence of a party desiring to introduce the testimony of an absent witness on a second trial, which he gave on a former one. This being in part a disputed question, it is worthy of the most careful consideration, as the great number of our new trials make it only too often desirable to introduce such testimony. The circumstances under which this may be done is the subject of this discussion. The Am. & Eng. Ency. of Law says: "The testimony of a witness, either oral or written, in a former judicial proceeding, may be proved in a subsequent action between the same parties or their privies, where the witness is dead or insane, or sick and unable to attend, or having been summoned appears to have been kept away by the adverse party." This is the general and well recognized rule and is considered as the law on this question, but in some states the rule is extended to the testimony of a witness absent from the jurisdiction of the court at the time of the second trial; this proposition is as stoutly denied in other states, and concerning this there are many interesting questions and an antinomy of cases.[1] Dr. Wharton says: "Proof of mere disappearance of the original witness is not by itself enough to admit such testimony if by due diligence the witness' attendance could have been secured, though it is sufficient to show that the original witness is absent and a non-resident in the state where the trial is held, being out of the jurisdiction of the court,"[2] and he cites the English cases which make it permissible to introduce such testimony when the witness is "beyond the sea" which, in England, meant nothing more than beyond the

1. Gastrell v. Phillips, 64 Miss. 478; Long v. Davis, 18 Ala. 80; Harris v. State, 78 Ala. 495; Bergen v. People, 17 Ill. 426, 65 Am. Dec. 672 and note; Sullivan v. State, 6 Tex. App. 319; Omaha St. Ry. Co. v. Elkins, 39 Neb. 480; King v. McCarthy, 54 Minn. 190; Gerhauser v. Noth Brit. & Mer. Ins. Co., 7 Nev. 284; Magill v. Kaufman, 4 Searg. & Rawle, 317, 8 Am. Dec. 713 and note.

2. 1 Whart. Ev., § 178.

jurisdiction of the English court, and in this country this would be true when the witness is out of the jurisdiction of the state. Before our modern theory of the law of frequent new trials for errors and other causes these questions were not so numerous, and hence they are questions of comparatively recent practice. In most of the earlier decisions it was held that such evidence was not allowable, as this was more in accordance with the general strict rules against hearsay evidence; but with the general relaxation of the strictness of these rules, and the passage of the statutes in many of the states permitting such evidence, it seems that the better decisions are now no longer opposed to this rule. It is well settled "that where a witness is only temporarily absent from the state, and it does not appear that he has been subpœnæd or that any effort has been made to procure his attendance or testimony, his evidence in another trial between other parties, cannot be produced."[1] The admission of such evidence from a former trial for a now absent witness, being in a manner hearsay, and against the general rules of evidence, and therefore only on the ground of necessity, it may be stated that such a privilege must be strictly construed, and it must affirmatively appear that such witness is beyond the jurisdiction of the court.[2] The mere absence of the witness does not render evidence of his testimony in a former trial admissible; and, indeed, many of the cases which held that the testimony of an absent witness given on a former trial is not admissible, can be explained by the fact that the witness could have been procured.[3] The Michigan court says: "One cannot introduce the stenographic notes of testimony given on a former trial without having exhausted the best sources of information which were reasonably accessible in order to show that the witness was outside of the jurisdiction of the court."[4] The New York courts do not allow the introduction of such evidence, and Judge Nelson mentions the strictness with which the rule is guarded by the courts.[5] In Texas there is a code provision permitting such evidence in both civil and criminal cases, but this is construed very strictly, and where the wife of the absent witness testified that she had received letters from him from some place outside of the state, it was held that the evidence was not admissible.[6] And in a later

1. Am. & Eng. Ency. of Law; Kellogg v. Secord, 42 Mich. 318.
2. Harris v. State, 78 Ala. 495.
3. Railway Co. v. Flanagan, 82 Ga. 579.
4. Mawich v. Elsey, 47 Mich. 10.
5. Crary v. Sprague, 12 Wend. 41.
6. Menges v. State, 21 Tex. App. 413.

case, which was well considered and is often quoted as rejecting such testimony of a former trial, the real point decided was that the statute was not strictly complied with. "We are of opinion that the absence of the witness was not sufficiently accounted for—to our mind, the tangible defect in this testimony was the want of any showing of proper effort to ascertain the fact as to whether the witness could be procured on the trial or not; whereas, it should have been shown that it was not in the power of the state to produce the witness in person before admitting his former testimony."[1] Likewise the Supreme Court of Iowa[2] excluded such evidence because not sufficient proof of diligence to procure the witness had been shown to admit such testimony under the code,[3] and as a rule such evidence could be admitted only under necessity; and in a later case,[4] decided in 1885, under the code, which provides for the admission of the stenographer's notes, when the witness himself cannot be procured in court, that evidence to the effect that that witness was reported to have left the state was not sufficient to admit such testimony from a former trial. So in California, where the code[5] provides for the admission of such testimony, it must be strictly construed. There are many courts which draw a strict distinction between civil and criminal cases, admitting such testimony in the former but excluding it in the latter. In a criminal case in Mississippi[6] they seem to admit the rule permitting such testimony in civil cases, but excluding it in a criminal case, and in the very next volume, in a civil case, they entirely deny the rule of admission, saying: "No reason exists for a different rule in civil cases; indeed, a stronger reason exists for admitting it in criminal cases."[7] While the California code[8] does not permit admission of such evidence in criminal cases, it is also excluded in New Hampshire,[9] Virginia and Kentucky, yet in the last case such evidence was excluded in every case except when the witness is dead, which is evidently bad law, and the Virginia case rests on cases which are determined

1. Sullivan v. State, 6 Tex. App. 319.
2. Slusser v. Burlington, 47 Iowa, 300.
3. Texas Code Crim. Proc., arts. 722-4.
4. Baldwin v. St. L., Keokuk N. Ry. Co., 68 Iowa, 37; Code of Iowa, § 3777.
5. Cal. Code, § 1870, subd. 8; Butcher v. Vaca Valley Ry. Co., 56 Cal. 298; State v. McQurin, 59 Cal. 348; People v. Mitchell, 64 Cal. 85; Ried v. Ried, 73 Cal. 206; People v. Gardner, 98 Cal. 127; People v. Gordon, 99 Cal. 227.
6. Owens v. State, 63 Miss. 450.
7. Gastrell v. Phillips, 64 Miss. 473.
8. People v. Chung Ah Chue, 57 Cal. 566.
9. State v. Staples, 47 N. H. 119; Broggs v. Com., 10 Gratt. 722; Collins v. Com., 12 Bush. 271.

on other grounds. The New York courts[1] seem to recognize the distinction in favor of civil cases, and the same is true in the United States Circuit Court.[2] Many of these cases excluding such evidence in criminal cases lay stress upon the constitutional provision guaranteeing to every accused the right to be confronted with the witnesses against him; this was held in the United States Circuit Court for New Hampshire.[3] In Louisiana,[4] where a state statute provided for admitting the state's evidence taken at the preliminary trial, it was held that such evidence taken at a preliminary trial on behalf of the accused was admissible, as he had suspected that the witness would soon leave the state on account of ill health, which he also did. The Arkansas court holds in a well considered case that such evidence is admissible in both civil and criminal cases, even though the former testimony was taken only before a committing magistrate at a preliminary trial, provided the accused was present and had an opportunity to cross-examine, and they hold that this is not contrary to the constitutional provision guaranteeing to every accused the right to be confronted with the witnesses against him at the trial.[5] And in a later and very similar case, which is often quoted, the court goes one step farther, holding that it is not even necessary to prove that the witness is out of the state, but simply that he cannot be procured.[6] Again in a later and very similar case the court followed the decision of *Shackelford* v. *State*, but Judge Eakin wrote a strong dissenting opinion, and drew a distinction between the case where the former testimony was taken on a former trial where the accused was confronted with the witness against him, and where he was presumed to cross-examine him, and the case where such testimony was given on a preliminary examination before a committing magistrate where the accused was not bound to make any answer at all. He claims that the constitutional guarantee, that every accused shall be confronted with his witnesses against him on the trial, should not be given any unnecessarily broad construction, and hence can mean only on the trial, and not at any other place or time.[7] This seems to me is a good distinction and rests on sound reason, and at the same time it will not militate against my conten-

1. People v. Newman, 5 Hill, 295, decided in 1843.
2. U. S. v. McComb, 5 McLean, 289.
3. U. S. v. Angell, 11 Fed. Rep. 34.
4. State v. Steward, 34 La. Ann. 1037.
5. Hurley v. State, 29 Ark. 17.
6. Shackelford v. State, 33 Ark. 539.
7. Dolan v. State, 40 Ark. 454.

tion that evidence of a former trial can be introduced when the witness cannot be found or is out of the jurisdiction of the court in both civil and criminal cases; on the contrary it will explain many of those cases which would otherwise hold the contrary rule. That such evidence from a former trial is admissible in a case where the witness has since died is admitted by all good authority. This is on the ground of a legal necessity, and there is a great division of authority as to whether a witness' whereabouts, being unknown or remaining outside of the jurisdiction of the court, should be considered as a witness dead, and his evidence on a former trial be introduced as a legal necessity. The New York court holds that it should not[1] but in an oft-quoted case they say: "There can scarcely be a shade of difference between the two cases, death and absence, either in principle or hardship."[2] Others also agree with the New York courts.[3] But many others again hold that there is no necessary distinction between the two cases.[4] The California court before the code permitting such evidence was passed, says: "The rule allowing proof of testimony of a deceased witness applies equally to witnesses out of the state."[5]

The Michigan court holds well for my contention. It says, in 1878, in a case where the witness could not be procured, being out of the jurisdiction of the court: "There is no good ground for any such distinction. In a case like the present the witness is to all intents and purposes, so far as these parties are concerned, legally dead. They can no more avail themselves of his personal presence in court than though he were in fact dead."[6] The same is held in other cases.[7] The Pennsylvania court holds the same way in an early and oft-quoted case. "We should consider the residence of the witness in the State of Ohio the same thing as his death for the purpose of letting in the evidence of what he swore on the former trial."[8] In accordance with reason and justice many states have passed laws permitting such testimony of former trials when the witness is out of the jurisdiction of the court. The California cases are

1. Wilbur v. Selden, 6 Cow. 162.
2. Crary v. Sprague, 12 Wend. 41.
3. Gastrell v. Phillips, 64 Miss. 473.
4. Hooker v. Jameson, 2 W. & S, 438; Clinton v. Eites, 20 Ark. 216, 235; Franklin v. Gunnersell, 11 Mo. App. 306; Kindrick v. State, 10 Humph. 479; Summons v. State, 5 Ohio St. 325.
5. State v. Devine, 46 Cal. 45.
6. Howard v. Patrick, 38 Mich. 795.
7. Stewart v. First Nat. Bank, 43 Mich. 257; Dunbar v. McGill, 69 Mich. 297.
8. Magill v. Kaufman, 4 Searg. & Rawle, 317, 8 Am. Dec. 713, and note 1818.

based on such a code.[1] Likewise in Texas there is a code provision.[2] The Iowa code even allows the introduction of such testimony, when the witness is only in another county, and on which many of her cases are based.[3] The Nebraska code is as follows: "Duly certified copies of all entries and records or papers belonging to any public office, or by authority of law filed to be kept therein, shall be evidence in all cases of equal credibility with the original records of papers so filed."[4] This is very similar to the Wisconsin code,[5] but it seems to me they really both provide only for making certified copies of the papers of equal credibility with the originals filed, yet under this the Nebraska court held evidence of a former trial admissible when the witness was out of the state.[6] There is still another question concerning this topic on which the courts are divided: whether such testimony of a witness on a former trial should be admitted when the witness is out of the jurisdiction of the court but his whereabouts are known and his deposition might be taken. The admission of such testimony from a former trial is permitted as a legal necessity, and so a long line of decisions holds that secondary evidence of this kind should not be admitted while the deposition of the witness might have been taken. This is held in Mississippi[7] and in the oft-quoted case of New York,[8] which is also authority for holding that in no case can a witness' testimony be admitted unless the witness, by whom it is sought to make the proof, is able to state the exact words of the absent witness, which rule would make all such testimony an impossibility unless a stenographer had been present, and hence this case is evidently bad law. Then again it is so held in New Jersey[9] but the same case would also exclude witnesses who have been kept away by the opposite party, and also those whose residence is unknown. Again it is so held in New Mexico,[10] which bases its authority on five cases.[11] The first

1. Subd. 8, § 1870; Hicks v. Lovell, 64 Cal. 22; Benson v. Shotwell, 108 Cal. 163.
2. Code Crim. Proc., §§ 2532, 2534; Menges v. State, 21 Tex. App. 413.
3. Iowa Code, §§ 3721, 3777; Baldwin v. Ry. Co., 68 Iowa, 37; Fleming v. Town of Shenandoa, 71 Iowa, 456; Bank of Monroe v. Gifford, 79 Iowa, 300.
4. Nebraska Code, § 408.
5. R. S. Wis., § 4140.
6. Spielman v. Flynn (1886). 19 Neb. 342; City of Omaha v. Jenson, (1892). 35 Neb. 68.
7. Gastrell v. Phillips, 64 Miss. 473.
8. Wilbur v. Selden, 6 Cow. 162.
9. Berney v. Mitchell, 34 N. J. Law, 341.
10. Kirchner v. Laughlin, 28 Pac. Rep. 175.
11. Wibur v. Selden, 6 Cow. 164; Berney v. Mitchell, 34 N. J. Law, 341; LeBaren v. Crombie, 14 Mass. 284; Gerhauser v. North Brit. & Merc. Ins. Co., 7 Nev. 174; Bergen v. People, 17 Ill. 427, 65 Am. Dec. 672 and note.

two I have just considered, while the Massachusetts case is not a good authority, though it is often quoted. It also holds that such evidence is not admissible if the witness in the meantime had become disqualified by virtue of being convicted of some infamous crime, and the reporter to this case well says: "This decision is supported by no authority and is inconsistent with general principles." But the Nevada case before cited is a well considered opinion, and after decision the court was petitioned for reargument, but the court came to the same conclusion. "Where the witness can be found and his deposition taken, neither expediency nor necessity requires the admission of hearsay as to his previous testimony." But the Illinois case cited seems to be out of line with all good authority. The evidence offered was from a witness shown to be beyond the jurisdiction of the court by the procurement of the opposite party, which is considered one of the grounds for admitting such testimony by the most conservative courts, yet this court held otherwise. In an Iowa case, while the court held in favor of taking a deposition, it was rather a mere dictum, as the real point decided was that not sufficient diligence had been shown to obtain the presence of the witness in court.[1]

On the other hand we also have an array of most able decisions, holding that such evidence of a former trial is admissible though the deposition of the witness might have been taken out of the jurisdiction of the court. The Pennsylvania court held this in 1818.[2] In Indiana the court held[3] that it lies within the sound discretion of the judge to determine whether such admission better serve the ends of justice than to have a commission ordered to take a deposition. And no less eminent an authority than Chief Justice Cooley held in 1885, that where the deposition had been taken by stipulation and was offered in court, the deposition might not cover the whole of the testimony or be merely supplemental to it, the testimony from a former trial should be admitted, the court remarking: "We do not think the defendant could exclude the plaintiff's right to put the evidence he had taken before the jury by subsequently retaking it on his own behalf."[4] The same is held no error in a later case, 1891,[5] where it was not shown but that the deposition of the absent witness

1. Slusser v. Burlington, 47 Iowa, 300.
2. Magill v. Kaufman, 4 Searg & Rawle, 317, 8 Am. Dec. 713 and note.
3. Shearer v. Harber, 36 Ind. 536.
4. Labor v. Crane, 56 Mich. 585.
5. Rosenfield v. Case, 87 Mich. 295.

could have been taken. And in the same volume,[1] the testimony taken on the second trial was admitted in the third, but not that taken on the first trial, as there was a material change between the first and the second. The Nebraska court also holds such testimony of an absent witness admissible,[2] and in the most recent case on the subject (1894), the same court holds it in a well considered opinion, independent of the statute there existing, reviewing all the important decisions on the subject. The question presented was whether the testimony of a witness given upon a former trial of the same case was admissible in evidence, simply upon a showing that the witness was out of the jurisdiction and beyond the reach of the court's process. The court says: "Upon a careful consideration, we are convinced that the rule stated in *City of Omaha* v. *Jansen*, *supra*, is in accordance with the weight and the reason of the authorities. Only two of the cases cited as opposing the rule are entitled to weight. The others are based on other distinctions or on untenable grounds."[3] The same is held in two recent cases in Minnesota which are well to the same point.[4] This brings me to consider the reasons for such admission, and I can do no better to strengthen the argument for my contention that such testimony of a former trial can be introduced when the witness is out of the jurisdiction of the court, even when his deposition might have been taken, than by quoting from the former of these two Minnesota cases: "The real objection to such evidence is that it is only the testimony of some one else as to what the witness swore to the former trial; and before the day of official reporters in our trial courts the accuracy or completeness of such evidence depended entirely upon the fallible memory of those who heard the witness testify. It can be readily seen why, under such circumstances, courts were disinclined to admit such evidence except in cases of actual necessity. But where the words of a witness as they come from his lips are taken down in full by an official court stenographer, this objection does not apply. We do not see why such testimony is not as satisfactory and reliable as a new deposition, taken out of the state, would be. Rules on such subjects should be practical and subject to modification as conditions change." It may be that the law is conservative, and that the rules of evidence, being arbitrary, will not change except by statute, yet it seems to me that

1. Schindler v. Milwaukee, L. S. & W. By. Co., 87 Mich. 400.
2. City of Omaha v. Jensen, 35 Neb. 68.
3. Omaha St. Ry. Co. v. Elkins, 39 Neb. 480.
4. Minneapolis Mills Co. v. Minneapolis & St. L. Ry. Co., 51 Minn. 304; King v. McCarthy, 54 Minn. 190. These cases were decided in 1892 and 1893 respectively.

they also rest on reason and that when conditions change they should change with them, and this is certainly the case in our modern method of taking and preserving testimony, and thus make it easier to obtain and preserve the truth; and while it may be argued that our means of transportation have also so changed that it becomes comparatively easy to procure the deposition of an absent witness, yet I see not what will be materially gained by admitting a deposition over the testimony of a former trial. It is contended by the Nevada court, that "the deposition is the primary and best evidence;"[1] but it seems to me that at best a deposition in one sense is also merely secondary evidence, and all the objections to the testimony on a former trial exist also against the deposition, and even many others. The Massachussetts court says, in referring to such testimony on a former trial: "This species of evidence is certainly not free from inconvenience, especially the want of knowledge of the manner of expression, the countenance, and the conduct of him upon whose relation the proof of the fact is to rest may materially affect and perhaps sometimes totally change the character of the testimony."[2] But why does this not also apply to a deposition; here, too, the jury cannot judge as to the veracity of the witness by his expression and appearance, and furthermore in a deposition the witness is under quite different environments than at a trial; he is not in the presence of the dignified and awe-inspiring court or the jury, or the party against whom he testifies, with all eyes upon him, and he may not be nearly as much prompted to speak the truth in some notary's or court commissioner's office, where he may give quite a different coloring to his statements when thus confronted by none of the parties, and perhaps other attorneys who may know little or nothing about the particulars and truth of what he testifies to, than he did in the former trial, and the truth is ultimately the object of all evidence. Nor can I see how in a deposition the accused is in any sense confronted with the witnesses against him, but which he certainly has been on the former trial, the testimony of which I think should be introduced when the witness is out of the jurisdiction of the court.

Hence my conclusions from this lengthy considerration are that: I. The testimony of a former trial between the same parties, concerning the same subject-matter, can be introduced: 1st, when the witness is dead; 2d, when the witness is insane or sick or is

1. Gerhauser v. North Brit. & Mer. Ins. Co., 7 Nev. 174.
2. LeBaron v. Crombie, 14 Mass. 234.

prevented from some other cause from attending the trial, such as having been convicted of some infamous crime or the like; 3d, when the witness cannot be found after diligent search; 4th, when the witness is prevented from attending the trial by the procurement of the opposite party; 5th, when the witness is out of the jurisdiction of the court. II. Since the admission of such evidence being permitted on the ground of necessity, the rule should be strictly construed: and 1st, mere temporary absence is not a sufficient cause; 2d, it must affirmatively appear that due diligence was shown to procure the presence of the witness. III. That there is no material distinction between civil and criminal cases except that under the latter the rules are more strict, and that where the constitution provides that the accused shall be confronted with his witnesses against him, that the better rule is that it is not sufficient that he was merely confronted by him on the preliminary hearing before a committing magistrate, where he was not bound to answer at all. IV. That such testimony of a former trial can be admitted even though the deposition of the absent witness might have been taken. V. Statutes permitting the admission of such testimony and depositions, being contrary to the general rules of evidence, should be strictly construed.—*Central Law Journal.*

MICHIGAN LAW JOURNAL.

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NOTES.

With this number of the MICHIGAN LAW JOURNAL we present an interesting and carefully prepared paper from the pen of Mr. Coutts of Charlotte. The article should not only prove of interest but be a valuable help in actual practice. Not without humor are some of these same cases whose number is legion and whose verbiage fills each year thousands of new volumes in this country of ours. That concious or unconcious humor should not appear in such a multiplicity of words were hard to imagine. In a recent case (filed March 6, 1896) in Kentucky, *Peek* v. *Traylor*, an appeal had been taken from a judgment for $5,000, given to plaintiff against defendant for alienation of a wife's affection. The Court of Appeals sets this aside as excessive and in a part of the opinion gives utterance to ideas which occasion this note to the case: "The amount seems especially excessive in view of the fact that prior to the alleged alienation of the wife's affections by appellant the appellee must have already alienated from himself whatever of that feeling she may have had for him by setting her on a hot stove." This strongly appeals to one's sense of the ridiculous and is a quiet sort of humor which occurring in one of our technical, dry law books, strikes the mind as in a desert, an oasis does the eye.

In the February number of the JOURNAL there appeared an article entitled "Is it Constitutional? The Other Side," in which the author contends that Act No. 152, Public Acts of 1895, requiring the governor to designate one of the circuit judges to hold court temporarily for the judge or judges of circuits in which the business has accumulated beyond the capacity of the judge or judges of such circuit to dispose of it. No one doubts the constitutionality of an act requiring circuit judges to hold court in circuits other than that on

which they were selected. The constitution expressly provides in section 11 of article VI., that circuit judges may hold court for each other and makes it their duty to do so when required by law. The attack which has been made was not upon the constitutionality of the act, but upon the construction which has been given to it by the judges of the circuit court for the county of Wayne. In that circuit the judges have requested the assistance of judges from other circuits and one or more of these foreign judges has been assisting the judges of the Wayne circuit, not by holding court for them, but by sitting with them as judges of that court, making the circuit court for Wayne county consist not of five judges as provided by law but of six or seven judges. The constitution very clearly provides for circuit courts of one circuit judge excepting in Wayne, Saginaw and Kent counties, where the number elected shall be such as may be provided by law. When elected, the judges of the circuit court in the three counties named constitute the circuit court for the county, and it is not within the power of the legislature to add to the number of judges in those counties excepting by election as provided by law.

In the counties named, the court under the several acts passed providing for additional judges, assigns cases for trial to the several judges, but the judgment entered is the judgment of the circuit court which is composed only of the judges elected, or such other judges who may sit in place of, "for" the judge or judges who may be absent or otherwise disabled from sitting. There is no warrant in the constitution for the contention, nor does the act in question contemplate that the judgment of any circuit court shall be rendered by other than the constitutional number of judges for that circuit.

The act providing for the assignment of cases for trial contemplates an assignment to the judges who compose the court and who render the judgment of the court—the circuit court for the county, and unless the assisting judges may form part of the court these cases cannot be assigned to them for trial. If court may be composed of more judges than are elected for the circuit, then the assisting judges may sit and form part of the court, but if they cannot constitutionally do so, cases cannot be assigned to them for trial. There is no such thing constitutionally as an assisting judge who is not one of the judges for the time being of the court.—*J. J. Speed.*

LEGAL MISCELLANY

Among the guests of the Lord Chief Justice at his dinner party in Harley Street was Mr. Justice Oliver Wendell Holmes who will shortly be engaged in entertaining Lord Russell in America. The son of the genial 'Autocrat' is amongst the best equipped lawyers on either side of the Atlantic. His book on 'The Common Law,' which he wrote several years ago, is one of the most erudite legal works ever published, and has enjoyed a large circulation in England as well as in America. The judges of different countries might advantageously have a greater knowledge of one another, and the growing intimacy of English and American lawyers is a welcome sign of the times.—*Law Journal*, (*London, Eng.*)

An important decision has been rendered by the circuit court of Hancock county, Ohio, involving the right of a railroad conductor to confiscate a mileage book when it is presented by a person other than the one who purchased it. Arthur J. Morton, a local ticket broker, purchased a mileage book from the Lake Erie & Western company. When a third party attempted to use it the conductor of the defendant company took it up and collected fare. Suit was brought by Morton to recover the value of the book. The circuit court, reversing the decision of the common pleas, awarded Morton judgment for the amount of his claim with interest and costs.

The court stated that there was nothing in the contract between Morton and the railroad company whereby the latter acquired a title to the ticket because it was in the hands of a third person. The book was purchased by Morton and the title passed from the railroad company when it was sold. The conductor could only refuse to accept the mileage and collect full fare.

The Lord Chancellor's bill, to prevent the abuse of the process of the courts by those habitual and incorrigible citizens with whom the judges are only too familiar, ought to pass into law this session. It enables the Attorney-General to obtain an order prohibiting any suitor, who has been in the habit of bringing actions without reasonable cause, from instituting any legal proceedings without the leave of a judge. The order is not to be made until the party affected by it has had an opportunity of being heard, so that no

practical injustice will be done. But the fetter, once imposed, will apply to future as well as to pending litigations. The principle underlying this measure had long been admitted. The courts have an inherent and statutory jurisdiction to stay frivolous and vexatious suits. Litigants of the kind struck at by the bill have been excluded from particular courts; a general prohibition is, therefore, logical. It is also necessary in the interests, not only of the courts and the public, but of the suitors, whose excessive litigiousness cannot fail to act prejudicially on such fortunes as they possess and on their own physical and mental conditions.

During William H. Seward's early practice at the bar actions of ejectment were very frequent. Owing to his peculiar knowledge of the sources of titles growing out of the possession of what was known as soldiers' claims, he was largely engaged in trying ejectment causes. It was often the case at the time of the birth and death of the original proprietors of lands became important questions in these suits, which were frequently settled by inscriptions on tombstones. Seward did not hold that kind of evidence in very high estimation, for the reason of the ease with which inscriptions on tombstones could be changed, and for the mistakes in them.

In the trial of the important ejectment case of *Hazelton* v. *Purdy et al.*, Seward appeared for the defendant. During the trial the period of the birth and death of a brother of the plaintiff, through whom the former derived title, became an important question, which the plaintiff's counsel attempted to establish by the inscription on the tombstone of the deceased. There were some things connected with this evidence which Seward seized as the grounds of a bitter attack on the inscription. The counsel for the plaintiff expended much eloquence in describing the sacred character of the record on the tombstone, Seward, in his reply, said: "I admit the sacred" I had almost said the hallowed, association, reflections and eulogies connected with tombstones. And yet, like some biographers, they give no real index to the characters of events in the lives they seek to commemorate. Tombs are the clothes of the dead. A grave is a plain suit; a rich, elaborately chiseled monument is an embroidered one. He was an able, ingenious man that first taught marble to speak; but he was an intensely dishonest one that first taught it to lie, for his teachings have spread over the entire world."—*The American Lawyer.*

Although the question of soundness of horses has been the frequent source of litigation, the question of 'soundness' as to dogs has never found its way into the reports. At the Leicester Assizes the question arose in an action to recover damages for a breach of warranty in regard to the soundness of a dog bought for 80*l.* for stud

purposes. Mr. Justice Grantham held in point of law that the term 'sound' must, on the authority of *Kiddle* v. *Burnard*, 9 M. & W. 668, and *Coates* v. *Stevens*, 2 M. & Rob. 113, mean sound for the purpose for which the dog was required, and that the defendant must have known the purpose for which the dog was bought; and he further found as a fact that the sending off the dog by the seller in response to a telegram by the buyer saying, 'Will take dog if sound,' was an implied warranty that the dog was sound for stud purposes. Though the warranty appeared upon the evidence to have been given *bona fide*, the dog, as a fact, proved to be incapable of fulfilling the purpose for which he was bought. Both professional and amateur 'fanciers' acknowledged that such a case had never come within their experience, though one expert said that he knew of an instance where there had been temporary incapacity in a dog otherwise to all appearance sound. There was no physical unsoundness apparent or discoverable in the dog itself. The judge, sitting without a jury, found as a fact that the dog since the sale was useless for the stud purposes for which it had been bought, and gave judgment for the plaintiff for the amount paid, minus the present value of the dog as a domestic companion.—*Law Journal*, (*London*, *Eng.*)

BOOK REVIEWS.

Select Cases on THE LAW OF EVIDENCE as applied during the examination of witnesses, with notes by AUSTIN ABBOTT, LL. D., Dean of the New York University Law School; author of "Trial Evidence," etc. New York: The Diossy Law Book Company. 764pp.

Text books on the subject of evidence are numerous and necessary and that field is already well covered. This volume is not a text book but covers the special department of the application of the rules of evidence in the examination of witnesses. The points here touched upon are systematically grouped so as to give a clear idea of the reasons for the decisions on the points in controversy. The scheme of the work is to present mostly from the New York reports selected cases or parts of cases which clearly and briefly illustrate points raised in the examination of witnesses. The volume is, of course, especially of use in New York state, where the application of the case law here so carefully collected is of immediate use as precedent for like cases, but remembering that the Court of Appeals of New York is the highest of the state courts in authority and reputation, the merit and usefulness of the volume in any state is unquestioned. Many of the points are sure of application and acceptance by the courts of other states however widely the rules of law in those states may differ from the rules of law of New York. In Michigan the book should receive a hearty welcome. It is clever in conception, and excellent in arrangement and execution. There is a very complete index of subjects, and both the literary and typographical features of the book are of the best. Should other subdivisions of the general subjects of law be in a like manner as carefully covered, the work of preparing a case thoroughly and trying it conscientiously and without error would be far easier than it is to-day. We compliment both author and publisher on this volume.

RECENT MICHIGAN DECISIONS.

ADVERSE POSSESSION—EVIDENCE—ARGUMENTATIVE CHARGE.—In an action to recover the possession of land of which defendants claim title by adverse possession it was not error to admit testimony which would advise the court and jury of all the acts of the grantors of the defendants in order to characterize such possession as they did exercise over the lands in controversy.

Where a request to charge is one which a party is entitled to have given it is error for the court to so modify it as to render it ambiguous and misleading.

It is error for the trial court to make his charge augumentative. *Chabert* v. *Russell, et al.* June 30, 1896.

CHANCERY PRACTICE—EQUITABLE ASSIGNMENT—MULTIFARIOUSNESS.—Where the allegations in a bill filed for the purpose of setting aside a discharge of a mortgage and reinstating the mortgage show that complainant became the owner of the mortgage by gift and transfer to himself by the mortgagee, his father during his life time, and the further allegation that the discharge was made and delivered to him in the expectation that a new mortgage for the same debt was to be taken in his name, it is a sufficient allegation of an equitable title and assignment and entitles complainant to maintain the bill in his own name.

The fact that the prayer of a bill in chancery asks for different kinds of specific relief in relation to the same subject matter against the same parties and in favor of the same persons does not make the bill multifarious. *Densmore* v. *Savage, et al.* June 30, 1896.

CHATTEL MORTGAGE—COLLUSION—SALE IN BULK—SALE BEFORE MATURITY OF ALL INDEBTEDNESS.—A purchase by mortgagees of property sold under a chattel mortgage given to secure indebtedness will not be set aside as in fraud upon unsecured creditors of the mortgagor, it appearing that the indebtedness secured by the mortgage was bona fide; that the sale was an open one of which proper notice was given, and that, in the absence of other bidders, the mortgagees were forced to bid in the property.

The fact that the property was subsequently sold by the mortgagees to the wife of the mortgagor would not be evidence of collusion, it appearing that before such sale the creditors were given an opportunity to purchase.

2. In the absence of any other liens at the time of the sale, the consent of the mortgagor having been obtained the sale cannot be attacked for the reason that at the time of the sale default had been had in only one of the notes secured by the mortgage.

3. In the absence of any provision calling for a sale in parcels, it was competent for the parties to agree that the sale should be in bulk. *Hogan* v. *Hudson.* July 30, 1896.

EQUITY—SUBROGATION—BILL OF COMPLAINT.—Where one loans money to pay off an incumbrance upon property under an agreement with the debtor that a new security shall be given him, he will be subrogated to the rights of the incumbrancer to the amount of the loan and the interest thereon. *Van Voorhis* v. *Bond.* June 30, 1896.

EXECUTION—LEVY—ALIAS EXECUTION—ABANDONMENT—INVALID LEVY.—The issuance of a second execution after levy made upon the first execution and delivery of the writ to the justice while evidence of an abandonment of the levy, is not conclusive evidence and may be overcome by testimony showing the contrary.

While the levy made upon a first execution remains unsatisfied in whole or in part, no second execution can issue or levy be made upon it. *Friyer* v. *McNaughton.* June 30, 1896.

FRAUDULENT CONVEYANCE—EXCHANGE OF PROPERTY—EVIDENCE.—One cannot be relieved from a contract for the exchange of property on the ground that the lands delivered to him were other than those agreed upon, it appearing that had he exercised ordinary care he could have discovered the alleged fraud and that neither the grantor or his authorized agents were responsible for his failing to discover the real situation of the lands deeded to him. *Beebe* v. *Birkett.* June 30, 1896.

GARNISHMENT—NON-RESIDENT DEFENDANT—SERVICE—JURISDICTION—EVIDENCE.—Service of a declaration and rule to plead upon a non-resident will support garnishment proceedings instituted at the same time and not dismissed before the declaration, although the writ of garnishment is served before the declaration and rule to plead. Under such circumstances the court would acquire jurisdiction of the garnishee defendant subject to the necessity of its acquiring jurisdiction of the principle defendant.

A rule to plead may be entered nunc pro tunc after the filing of the declaration.

Claimants to a fund having intervened in garnishee proceedings and obtained a vacation of the judgment, cannot, after suffering the matter to proceed to another judgment, question the validity of that judgment save on jurisdictional grounds. In an action to recover upon a contract, garnishee proceedings were pending involving the same matter, and the defendant pleaded the general issue, with a notice of a prior suit pending. Before the trial, judgment was taken and defendant amended his notice so as to allege the same.

Held: That the amended notice raised a new issue upon the merits, and if the facts alleged were proven, they were a bar to the action, to the amount of the judgment. *Coe* v. *Hinkley.* June 30, 1896.

HOUSE OF ILL-FAME—INFORMATION—EVIDENCE—INSTRUCTION TO JURY.—The date in an information for the commission of an offence may be fixed by the date shown on the examination.

A continuing offence may be charged as having been committed on a day certain and on divers days and times between that and another day specified. It is not essential that the earlier date be first named.

In a prosecution for keeping a house of ill-fame, it is competent to show that one of the inmates of the house was a female who had borne the reputation of being a common prostitute.

It was competent to show what the reputation of one of the inmates had been for three years past, the testimony covering the period down to the time in question.

It was not essential for the people to prove the reputation of men who resorted to the house, if they were of lewd character, and their acts were such as to warrant the inference that they resorted to the place for the purpose prohibited by the statute.

A charge to the jury which gave them to understand that before they could convict there must be an actual finding that the purposes for which the house was resorted to were those named in the statute was correct. *People* v. *Russel.* June 30, 1896.

MUNICIPAL CONTRACTS—DUTY OF COUNCIL TO LET TO LOWEST BIDDER WHOSE BID IS REFUSED TO RECOVER DAMAGES DENIED.—One who is the lowest bidder for a contract to be let by a municipal corporation and whose bid has been rejected, has no right of action at law to recover profits which he might have made had his bid been accepted.

While under the charter of the city of Detroit it is the duty of the city to let the contract to the lowest responsible bidder, this charter provision was not passed for the benefit of the bidder, but as a protection to the public.

Wherever an action at law is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty and that the duty was imposed for his benefit. But where the duty was created and imposed for the benefit of another and the advantage to be derived to the party prosecuting by its performance is merely incidental and no part of the design of the statute, no such right is created as forms the subject of an action. *Talbot Paving Co.* v. *City of Detroit.* June 30, 1896.

PARTNERSHIP—DISSOLUTION—SALE OF LANDS—JURISDICTION OF COURT—OHIO CODE—ESTOPPEL—DECREE.—When one of the co-partners appears and answers a petition praying for the dissolution of a partnership, appointment of a receiver and sale of the partnership lands, and consents to the receiver appointed by the court, he must be held to have submitted himself to the jurisdicsion of the court.

Under the statutes of the state of Ohio, the Superior Court is given jurisdiction

to try and determine causes brought for the dissolution and accounting of partnerships, a sale of the partnership lands and a general settlement of its affairs, and in effect is regarded as having such jurisdiction as an ordinary chancery court of general jurisdiction.

The jurisdiction of a court of equity extends to all matters necessary to wind up the affairs of a partnership, including the sale of real estate; and the jurisdiction is not local even though a part of the assets consists of real property and that although that property may be situate in another county or state.

2. In a petition or bill filed for the dissolution of a partnership and sale of the partnership lands, it is not necessary that the property be specifically described.

No proceedings having been taken to set aside the judgment of the Ohio court, the questions there adjudicated cannot be reopened here. The findings of that court are res adjudicata.

3. Parties and their privies can obtain relief from a fraudulent decree only in a direct proceeding for that purpose one in the court where the original proceeding was had, either by writ of error, or by some other means to set the judgment aside.

4. A description of the lands in the decree in which the number of the section, town and range is given, is sufficient. *Dunlap, et al.* v. *Byers, et. al.* July 8, 1896.

SALE—FRAUDULENT REPRESENTATIONS—RECESSION—WAIVER OF NOTICE.—Where one is in the possession of property under a contract of purchase which he has been induced to enter into through the fraudulent representations of another, it is his duty, upon discovery of the fraud, to rescind the contract, and notice of such recission must have been promptly given, and adhered to, in order to bind the parties thereto.

A continued use of the property for some thirty days after knowledge of the misstatements made by the vendor, would be a waiver on the right of recission even though notice of such recission had been given. *Goster* v. *Rowley.* July 1, 1896.

WILL—TRUST—CONTINUATION OF BUSINESS BY TRUSTEES—LIABILITY OF TRUSTEES.—Provisions in a will may be such that a trust is necessary to carry out and enforce them, and the general rule, that "the form of an instrument, by which a trust is sought to be created, is immaterial, and that no technical words are necessary, applies to wills, and no arbitrary rule exists for determining whether or not a trust has been created by a will.

It is entirely competent for a testator to provide for the continuance of his business for a given time, and he may, if he deems it best, subject all of his property to such purpose.

A trustee has the right to exclude his personal liability, if he so makes his contract, and where the parties expressly contract that no personal liability shall attach to the trustee, the creditor would necessarily depend upon such liability as might lawfully be created against an estate. *Packard, et al.* v. *Kingman, et al.* (May 26.)

PROMISSORY NOTE—BONA FIDE HOLDER—EVIDENCE AS TO FRAUD—PURCHASE BY BANK—STIPULATION BEFORE JUSTICE.—Where, after a disagreement by a jury, the parties enter into a written stipulation to submit the cause to the justice upon the proofs taken upon the trial, saving to the respective parties all questions raised upon such trial, the same as though the proceeding had been repeated before the justice, such stipulation is valid and binding. The submission of the cause to the justice, after such stipulation, is not a trial de nove.

In an action upon a promissory note, of which plaintiff asserted he was a bona fide holder, having purchased the same from the payee before maturity, plaintiff having failed to make out a prima facie case of such holding, evidence was admissible to show that the note was procured through the fraud of the payee.

A showing that a bank purchased a note from the payee, its customer, giving a mere credit for the same, is insufficient to show a purchase for value, it failing to appear that the credit was ever drawn upon, or that the account of which is became a part was exhausted, before the maturity of the note or before notice of fraud in its inception. *Drovers' National Bank* v. *Blue.* June 30, 1896.

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PATRIOTISM AND INTERNATIONAL BROTHERHOOD.

Baccalaureate Address.

PRESIDENT JAMES B. ANGELL OF ANN ARBOR.

In his great address on Mars Hill Saint Paul declared that God "hath made of one blood all nations of men," and also that He "hath determined the bounds of their habitation."

The brotherhood and the separateness of nations are thus clearly set forth as of divine appointment. If they are so, they must be compatible with each other. It must be possible and right for nations to lead each a separate life, and yet to live in brotherly relations. There must then be some proper way of cherishing the sentiment of patriotism and at the same time a brotherly regard for mankind.

We profess, as individuals and as a nation, to be governed by the principles of Christian ethics. We are all agreed that patriotism is so commendable a virtue that we despise, if we do not hate, a citizen who is devoid of it. We are all agreed that our nation, if it is to be respected by others or by us, must maintain its rights with dignity and self-respect.

While our country cherishes this spirit of manly independence, what attitude should it hold toward other countries? What spirit should we cherish toward other peoples? What relations should we aim to hold with them? These are questions which it seems proper that you should consider in a spirit at once christian and patriotic, as you are about to go forth into active life, where you will play an important part in shaping public opinion. I believe it is not unbe-

coming the day or the occasion that answer to them should be sought in the spirit of devotion to our country, of love to our race, and of reverence to the Father of nations.

Perhaps at the outset we should ask whether it really is possible for us to cherish the centiment of patriotism and at the same time the spirit of brotherhood towards the citizens of other nations. Some distinguished writers, like the Russian, Count Tolstoi, have maintained that the spirit of brotherhood ought to overpower and drown out the feeling of special devotion to one's own country. That eminent author goes so far as to say, "if patriotism is good, then christianity, which gives peace, is an empty dream." There is a story that the great and good Fenelon once said, "I love my family better than myself, I love my country better than my family, but I love the human race better than my country." The parable of the good Samaritan has been cited as condemning patriotism. No doubt that wonderful parable, which more than almost any other teaching of Christ, shows the extraordinary reach of his mind beyond the prevalent ideas of his day, does bid us regard the remotest dweller on the other side of the earth as our neighbor, and commands us to do what we may for his help.

But, after all, we cannot forget that God has set us first in families, then in nations. Our primary relations to our families are necessarily closer than our relations to our nation, and our primary relations to our nation are necessarily closer than our relations to the race. We may, however, find it our duty in the spirit of Fenelon's words, to tear ourselves away from our families and give our services and lives to our nation. We may find it our duty, like many missionaries, to tear ourselves away both from family and nation, to give our services and lives to mankind. It is obvious that the tenderest love for our families may co-exist with genuine love for our country, and the most ardent patriotism may not divest us of genuine love for our race. The contradiction which Tolstoi sees between patriotism and christianity, does not necessarily exist. They are not exclusive of each other.

Duties grow out of relations and are correlative with them. Our relations as children to our parents impose on us filial duties. God having set men in nations, the citizens of each nation owe special duties to each other and to their country. These are patriotic duties. So, too, each nation, our nation, must watch and work with special interest for its own welfare, while it cherishes a proper interest in the well being of all mankind, and carefully abstains from

injustice to any nation. Such a course is no more to be criticised as selfish than is the devotion by a man of his time and efforts to the support and well-being of his own family or of himself.

Providentially we are so situated that it has been easy for us, with a genuine patriotism, to develop our resources and to attend to our own affairs without much complication with the Great Powers of the world, and without cherishing sharp animosities toward them. None of the states south of us have been strong enough to be a menace to us. The ocean has been our great bulwark against encroachments from the east. From the moment that we escaped in 1798 from an entangling alliance with France, we have, with a wise instinct, obeyed the counsel of Washington to avoid any such alliance with transatlantic powers. All their dynastic disputes, their questions of balance of power, their quarrels about title to territory, their envyings and jealousies, which have compelled them to weigh themselves down with taxation for the support of great standing armies and navies, and have often involved them in dreadful wars, have not much concerned us and have given us no serious trouble. Their populations, sighing for our lives of peace and prosperity, have been hurrying by hundreds of thousands yearly to our shores to share in our comfort and happiness. However eagerly any one of the European nations may be watching to catch another at some disadvantage and fall upon it in war, not one of them desires aught but peace with us. More than once some of them have settled disputes with us by peaceful methods, which they could hardly have settled with each other save by war. It would, therefore, seem to be both wise and easy to continue our traditional policy of refraining from any part in purely European controversies, and to content ourselves with securing a just settlement of questions which grow directly out of our commercial intercourse with them.

On the other hand, there was a rational ground for the satisfaction with which we saw France, Spain and Portugal withdraw from the American continent. Especially were we constantly menaced with serious trouble with Spain so long as her territory touched ours. Though the Latin-American races, who inhabit the domain which stretches from our southern border to Cape Horn, have yet much to learn about the just administration of republican forms of government it is, in my opinion, a wise policy for our government to discourage the acquisition by European powers of any more territory on our continent than they now possess. If they are permitted to begin the carving up of the Central and South American

States according to the process by which they are grabbing all the most desirable territory of the African continent, we shall be in danger of having European controversies, from which we have kept aloof, transferred to our own neighborhood. There seems to be no indication that any European power is inclined to absorb any of the states of Central or South America, or would venture to do so, in the face of our strenuous protest.

There appears, therefore, every reason to hope that, if we pursue a policy of moderation, justice and firmness towards other nations, without being drawn into European entanglements or indulging in gratuitous exasperations of other powers, we may be left undisturbed in the enjoyment of peace and prosperity.

But it is too much to expect that questions will not arise from time to time—many of them serious and difficult questions—between us and other nations. We have of late years had several such problems, especially in our relations with Great Britain. War, according to modern methods, is such a dreadful calamity, that recently attention has been called afresh to the inquiry whether we may not make provisions with some nations, if not with many nations, for the establishment of an international court, to which difficulties that cannot be adjusted by the ordinary processes of diplomacy, may be referred for settlement.

It is conceded on all hands that this nation is most happily situated to take the lead in so beneficent a movement. Our geographical isolation frees us from many embarrassments which a European continental power might encounter in taking the initiative. We have already been conspicuous in our efforts to diminish and to avoid the evils of war. We were the first to emphasize the rights and duties of neutrals. We have already been engaged in more than four score arbitrations, two of which, that of the Geneva Tribunal for the settlement of the Alabama cases, and that of the Paris Tribunal, for the adjustment of the Bering Sea question, are the most famous and important in history. We can afford to propose a system of arbitration to the world just because we are strong. Our motives are not likely to be misinterpreted. Conscious that no nation would presume to attack us for slight cause, we can with dignity and self-respect commend to all nations the peaceful method of settling controversies.

The events of our great civil war and its happy termination in the preservation of the Union, have left two marked results on the spirit of our people.

First. It has caused a great strengthening of the national feeling. A new and profound interest in our history has been developed. This is shown by the organization of historical societies, and by the new activity of old societies; by the publication of numerous books on our national career, and by the establishment of various associations of the descendants of the revolutionary or pre-revolutionary men. A most commendable national pride manifests itself in a thousand ways.

And secondly, the nation has risen to a new consciousness of its military strength. After setting on foot the immense armies maintained by the Union and Confederate parties during our war, and carrying on the contest on such a grand scale for four long years, with a valor and endurance never surpassed, it is not strange that we should regard ourselves as one of the great military states of the world.

Commendable as is this pride in our history, and justifiable as is this confidence in our martial strength, they expose us to some dangers from the spirit they engender in persons of a certain aggressive and testy temperament. Instead of cherishing a calm and dignified sense of national power, which is sure that we can, without bluster or unnecessary sensitiveness at every idle word that is flung at us, make ourselves respected, it is disposed to be defiant, to indulge in challenges to all the world, to be needlessly boastful of our strength, to be too quick to interpret any unwelcome words from abroad as an insult, and so to generate friction between us and other nations. That in certain quarters there is somewhat too much of this spirit, I think must be obvious to all sober-minded men.

The spirit, which should be fostered by our patriotic pride and by our consciousness of strength, is that of quiet confidence in our power and of serene faith that no nation will lightly involve itself in serious difficulty with us. If there were no other reason for this faith, the delicate equipoise by which the great powers of Europe are kept from war with each other affords a sufficient ground for it. What European state could now be engaged in strife with us without exposing itself at once to attack from some one of its neighbors, who would welcome the opportunity? Their relations with each other put them under bonds to keep the peace with us, if it is possible for them to do so.

Not that we should diminish our present military and naval establishment. Our army is none too large, perhaps hardly large enough, for the police power which it is called to exercise over our

large expanse of territory. Our navy is none too powerful to represent us and protect our citizens and their interests in the various countries of the world. The coast defenses of some of our great cities might well be strengthened. I regard the maintenance of a moderate force and of defenses of our chief harbors as peace measures, which will make nations hesitate about imposing on us. It was a humiliating spectacle and a dangerous situation when a few years ago the little state of Chili, with her two or three iron-clads, was in a condition to defy our wooden navy.

Nevertheless, it remains true that we need not be bristling with excitement about the constant danger of attack from foreign powers, but that our attitude towards them should be one of dignified independence and of a friendly desire to settle all questions with them on a just and reasonable basis by peaceful methods.

Of late years there have been some notable expressions in favor of the arbitral settlement of controversies between nations. Resolutions in favor of it have been adopted by the Swiss Assembly, the Swedish Diet, the Belgian Parliament, the Dutch States-General, the French Parliament, the British Parliament, and by our Congress. The Institute of International Law, a body composed of the leading publicists of Europe have takeu the pains to work out a formal plan of international arbitration. President Cleveland, in a message to Congress, has emphatically commended arbitration. A body of three hundred men, representing forty states of the Union, and comprising many men of high influence and reputation, have recently held a meeting in Washington for the express purpose of urging our government to establish a permanent court of arbitration at once with Great Britain, if practicable, and as soon as possible with other nations. The reasons why it is proposed to begin with Great Britain are that not only members of Parliament, but also many other conspicuous British subjects, and some influential bodies, as, for instance, the Association of Dissenting Churches and the British Chamber of Commerce of London, have favored the plan, and because these two nations, Great Britain and the United States, have a common language, similar laws, like judicial traditions, and the most extensive and intimate commercial relations, and, furthermore, because they have already settled some of their most important controversies by arbitration.

It is therefore believed to be easier for them to set up a permanent system of arbitral adjudication with each other than for several nations in the present state of public opinion to establish

such a system. This is not the place to consider the form of a court. But it is believed by eminent jurists and statesmen that one can be constituted by Great Britain and the United States whose decisions would command the assent of both nations.

Let it not be supposed that all this is the mere dream of utopians. It is conceded that there are some questions which no nation can submit to arbitration. It can submit no question involving its independence or autonomy or the substantial integrity of its territory. There are some questions of honor, which a nation cannot submit. But there is a very large class of questions covering most of those which arise in the ordinary intercourse of nations, which can be properly left to arbitration, if diplomacy cannot dispose of them. Such are claims for indemnity to citizens or to a state for injuries done. Such are questions touching the interpretation or execution of treaties. Such are boundary disputes, not seriously involving the integrity of territory. Such are certain rights of navigation and fisheries. Any or all of these could wisely and safely be referred to a competent court, as wisely and safely as we refer controversies between the states of this Union to the supreme court of the United States.

If now this country and Great Britain can demonstrate the practicability and usefulness of an arbitral court, it is hoped that the chief European nations, who are not so grievously burdened by the maintenance of enormous armaments and the constant solicitude about the outbreak of war, may imitate our example. These two great English-speaking nations have a most conspicuous, if not a dominant, part to play in spreading civil freedom and Christian civilization through the world. If they can avoid serious dissensions with each other, and be true to their traditions of liberty and faith, it seems hardly possible to exaggerate the influence they may wield for good. Can there be any greater aid to their unity of action, any better guaranty of their cooperation in promoting the spirit of peace among nations than their adoption of a permanent system of arbitration with each other?

Let me repeat, it is not proposed to leave ourselves unprotected against danger, to surrender a solitary right of an American citizen anywhere on the face of the earth, to submit tamely to insult and injury from any power, to abate in the slightest degree the most ardent spirit of patriotism. Thank God, the day is long since past when any nation claims the right or ventures in defiance of right to lay hands on any man sailing in remotest seas under

the American flag. In the council halls of negotiation our diplomatists meet on equal terms with those of the proudest powers of the world. With perfect self-respect, nay because of our self-respect, we can afford to lay aside all petty jealousies of other nations, that inflammable sensitiveness which is a sign of weakness, that combative spirit, which is flinging out constant challenges. We can with manly dignity make it apparent to the world that we seek peace with all nations, but that we know our rights, and are bound, if necessary, to defend them with our good right arms, that much as we dislike war, we believe there are calamities more dreadful than war, and that we are ready to resort to war to avert them. But with the same manly dignity we can show to mankind that we are willing to submit to a properly constituted arbitral court all questions which are suited for arbitrament, and that by our words and our example we desire to commend to all nations this peaceful method of disposing of most international controversies, which cannot be adjusted by the usual methods of diplomacy.

I have thought it wise to direct your attention to this theme at this time, since you, as educated citizens, go out now into life to exercise an exceptional influence on public opinion, and I wish you to exercise an exceptional influence on public opinion, and I wish you to exercise a wise and conservative influence in shaping our policy towards other nations. Occasionally I hear the charge that life in our American colleges and universities is tending to beget a spirit of languid patriotism and political indifferentism in the students. I believe the charge to be utterly without foundation. It probably grows from the fact that after the careful study of economic and historical subjects, many young men find themselves unable to assent unqualifiedly to the sweeping or ambiguous statements of some political platforms. But with the recollections fresh in our memories of the days when so many of the bravest and best of our young men rushed from these halls and every college to the battle field, many of them, alas! never to return, it is difficult to imagine how any one can question the burning patriotism of the American students. There is no brighter chapter in the history of our civil war than that which records the valor of the young men who rushed from the colleges to the front in 1861. No more is it true that college students are not deeply interested in our political affairs, though it may be true, as it should be, that they are disposed to use their independent judgment in deciding on political doctrines.

It is because I have this confidence in your patriotism and in your purpose to bring a calm and thoughtful consideration to public questions that I have asked you tonight to reflect on what is our proper attitude as a Christian nation towards the other great powers, and especially on our duty in establishing an arbitral arrangement for the settlement of international difficulties. The European nations have cheerfully recognized the great services we have rendered to mankind by laboring for the vindication and the enlargment of the rights of neutrals and by furnishing so many illustrious examples of arbitration. They envy us our exemption from the dreadful military burdens under which they groan. Is there any higher and nobler service we can now proffer them than by showing them how to escape in many cases the dread arbitrament of war by the establishment of permanent courts? No nation questions our military strength. All nations will listen with respect to our appeal for peaceful methods of settling controversies and will watch with sympathetic interest our well considered efforts to introduce these methods in our own intercourse with other powers. Remembering that "God hath made of one blood all nations of men," what higher honor can we wish for our people than that they should add to all their triumphs in the industrial arts and in the establishment of free and republican institutions the splendid triumph of teaching all nations to live together as brothers under the blessed command of the Prince of Peace.

LIFE AND CHARACTER OF HON. ALLEN G. THURMAN.

Address of Hon. Geo. K. Nash, before the Ohio State Bar Association, Put-in-Bay, July 16.

MR. PRESIDENT AND GENTLEMEN: In the closing month of last year, at his beautiful and peaceful home in Columbus, Ohio, the sun of life of an old man, more than eighty years of age, went down. He had belonged to our profession. He had been a judge of the supreme court of our state. For twelve years he had served this commonwealth and his fellow citizens everywhere in the Senate of the United States. Seven years before his death, five and one-half million of electors of this great nation had esteemed him so highly that he was their choice for the second office in the Republic. Above all, he died with the universal respect and esteem of his countrymen, and a sincere love of all who had the honor of knowing him. The people of the entire country were mourners at his bier, but the most sincere of them all were his neighbors, the most of them without station or fame, among whom he had lived for many years, and before whom his life had been an open book.

The career of this man challenges our attention.

From whence did he come? What did he accomplish? What were his characteristics?

He was the product of our sturdy pioneer life and of our American civilization. Allan G. Thurman was born November 13, 1813, in Lynchburg, Virginia. His father was a minister of the Methodist Church. His mother was a daughter of Col. Nathaniel Allen, a nephew and an adopted son of Joseph Hewes, one of the signers of the Declaration of Independence. The family were poor from the fact that one of Allen's grandfathers, imbued with the spirit of freedom and humanity, had liberated his slaves. When he was but six years of age, his parents crossed the James river, wandered over the mountains which separated civilization from the then unknown west, and founded their home in Chillicothe, Ohio.

Young Thurman's boyhood days were not filled with hours of ease and pleasure. His facilities for an education were only such as were afforded by the new, struggling pioneer city, whose academy was his *alma mater*. Fortunately his mother was a woman of much character, of studious habits, had received a liberal education, and for her son had such love that after discharging the onerous duties of the household, she devoted many weary hours in directing his culture and education. After this son had become famed for his learning and ability, he paid this tribute to that faithful woman: "I owe more to my mother than to any other instructor in the world."

Some of Thurman's associates in the Chillicothe Academy seemed to be more fortunate than he. From its doors they departed to secure collegiate educations, while he was left behind to receive such education as he could by hard work, from well selected books, under the directing mind of his mother. It is related that when his companions mounted the stage and went away to college, he was seized almost with despair. The youth sought the old Presbyterian burying ground, and throwing himself upon an old fashioned flat tombstone, wept. The good sense which ever characterized his life, soon brought the thought that his tears were idle and vain. He told his sorrows to a friend who chanced to be wandering among the graves, and closed the recital with the determined remark: "If my school fellows come home and have learned more than I have, they must work for it." In an acquisition of solid learning, his academy fellows never got in advance of him. He studied, not only long after they had graduated, but during his entire life. To his mother, young Thurman was ever a true and dutiful son. A goodly portion of his earnings for many years after he became a member of the bar, was devoted to her support, and to that of his sisters.

From what he owed to his mother, it is easy to pass to the influence which another good woman exercised over his life. When more than thirty years old, he was married to Mary Dun, the daughter of a well known Kentucky family. A better and more benevolent woman never lived. Whenever sorrow cast its shadow upon the door of a neighbor, her kind sympathy was soon present to assist in binding up the bleeding hearts and alleviating the pain. She was a model wife and mother, and to the last day of her life, her chief pleasure was to care for the welfare and happiness of her husband. In their old age, the conduct of Judge and Mrs. Thurman towards each other, was like that of lovers, whose affection had been broadened and strengthened as the years rolled on. Mrs. Thurman

always addressed her husband as "Allen," and Judge Thurman never referred to his wife by any other name than "Mary," and this beautiful name never sounded half so sweet as it did when it fell from his lips, with such pathos and affection.

God only knows how much Judge Thurman and his country owe to these two good women. One watched over his cradle and guided the early years of his life. The other shared in his sorrows, his disappointments and his great honors. When old age came, she was spared until nearly the close. When she passed away, and he was left almost alone in his library, and with the books he loved so well, her sweet memory was ever present to cheer the lonely old man. By this last remark, I do not wish to be misunderstood. To the end, Judge Thurman was surrounded by his son and his good wife, and by his grandchildren. Their very great affection suggested many things by which they gave him very great happiness, and of them all he was very fond.

When Thurman first reached Chillicothe, and for many years thereafter, the little town had many distinguished citizens, who must have attracted the attention and admiration of the boy and young man.

There was Edward Tiffin, a native of Virginia, who manumitted his slaves and came to Ohio in 1796. He was our first governor, serving from 1803 until 1807. Afterwards he became a senator of the United States and died in 1829. Governor Tiffin was very popular on account of genial temperament, high professional and general culture, and above all, high moral purpose and character. In a letter to Governor St. Clair, General Washington spoke of "Dr. Tiffin's fairness of character in private and public life, together with knowledge of law, resulting from close application for a considerable time."

There was also another Virginian, Thomas Worthington, who brought his slaves with him to Ohio, and here gave them their freedom. He was one of the first senators in congress from the new state, and then became one of Ohio's governors. It is said of him that he was "a man of ardent temperament, of energy of mind, of correct habits of life," and that "he soon became distinguished both in business and in political stations." He was one of the friends of all the liberal and wise measures of policy, which were the foundation of Ohio's great prosperity. He died in 1827.

Again, there was General Duncan McArthur, a native of New York, an energetic and daring soldier, who did efficient service

during the war of 1812. in leading the pioneers in their efforts to protect the frontiers from the attacks of the British, and their savage allies. He became a governor of this state in 1830.

With Tiffin and Worthington from Virginia, there came another remarkable man, Robert Lucas, who settled in a county adjoining Ross. He was the son of a soldier of the revolutionary war. In the war of 1812 he reached the rank of lieutenant colonel in the United States army, which position he resigned that he might take command of a brigade of Ohio militia, and he did considerable service at Fort Meigs and Lower Sandusky. In 1832 he was chairman of the convention which nominated Andrew Jackson for president. In the same year he was elected governor of Ohio, and young Thurman served as his private secretary.

It does not require a heavy draft upon imagination to enable us to believe that the example, the lives and the success of these men did much to inspire the ambition of Thurman, and cause him to endure the labor necessary for the development of the man, whom all our countrymen admired and honored in his mature years. After all, it is probable, that the circumstances which surrounded his boyhood and young manhood, constituted the best possible school for the development of his sturdy and high virtues.

It is somewhat remarkable, considering the adverse circumstances which surrounded Mr. Thurman, that he was prepared for and admitted to the bar when he was not yet twenty-two years of age. His study of the law was pursued for a time with his uncle, William Allen, afterward a senator of the United States and a governor of Ohio, and later with Noah H. Swayne, who then resided in Columbus, but afterwards became a justice of the supreme court of the United States. He continued to practice law in Chillicothe until 1851, when he was elected as a judge of the supreme court of Ohio under the new constitution of the state. During these years he was very successful, and was employed in almost every litigated case in Ross county.

In October, 1844, he was elected by the Democrats to congress in a district in which the Whigs had formerly had a majority, and he took his seat and entered upon the active discharge of the duties of his office in December, 1845. During his term of service, the country was engaged in war with Mexico, and Mr. Thurman was an active supporter of the administration, and cheerfully voted for all appropriations which were necessary for its success. During this congress quite a controversy sprung up as to whether slavery should

be admitted into the future to be acquired territories of the United States. Mr. Thurman opposed any interference with the "Missouri Compromise," which had then been agreed upon, but he favored and voted, together with nearly all the Democratic and Whig members of the house from the North, for the Wilmot proviso. For this action Mr. Thurman and the other representatives from the North were severely criticized by the members from the South. On the 15th of January, 1847, Mr. Thurman made a speech in the house of representatives in reply to these criticisms. He was then but thirty-two years of age, and yet that speech was characterised by all the force and clearness and accuracy of statement, which caused the speeches of his after life to be so much admired. As proof of what I have stated, I quote the closing paragraphs of his address:

"Why then, does the North insist on opposing the extension of slavery territory? I answer:

"Because, first, as the municipal legislature of the territories, it is the duty of congress to promote their interests. The people of the free states think, whether erroneously or not, that it is for the interest of any country that slavery be permitted, and thinking so, we as the legislative power over the territories, deem it our duty, where it can be done without too great a sacrifice, to exclude slavery from them."

"Another reason:—That Congress is the national legislature, and therefore must look to the national interest; and as the strength and prosperity of the nation is composed of the strength and prosperity of its parts, it is the duty of Congress, no insuperable obstacle standing in the way, to pursue such a course of policy as shall strengthen in the greatest degree the United States; and believing that free territory would be more populous, wealthy, abundant in resourses, and in everything that makes great a nation, it is for the national interest to have as much free territory as possible, compatible with the existence of the Union.

"The third reason is, that in the opinion of the north, it is inconsistent with the genius of our institutions, and injurious to the character of the United States, to extend slavery. Where it exists, let it exist, says the north; but do not extend it by action of the general government, and convert what is now free, into slave territory."

At the close of his first term Mr. Thurman was offered a renomination, but this he declined in the following words: "In consequence of my election, I have been absent from my home for

nearly eight months, during which I have been able to give scarcely a thought to my private and professional business. That business now requires my immediate attention, an attention I should be unable to bestow on it were the duties and responsibilities of a candidate again devolved upon me. For, I hold that it is the duty of a candidate to be the hardest working man of his party, and to merit, by his undivided energy and industry, the confidence reposed in him by his friends. This it would be impossible for me, under present circumstances, to do." This was certainly a very proper and high view to take of the duty of one who becomes a candidate for office at the solicitation of his party and his friends.

Judge Thurman retired from the supreme court of Ohio in February, 1856, and thereupon fixed his home in Columbus, and opened an office for the practice of law. It is but just to say that the members of the first supreme court, under our new constitution, were characterized by great ability and learning. Judge Thurman was certainly the peer of his associates, and this service gave him a great reputation as a lawyer.

During the war of the rebellion, owing to the fierce passions of partisans, Judge Thurman's position was not correctly understood, and during that time some unjust and cruel things were said about him. In later and calmer years full justice was done to him, and his countrymen came to believe that he was never other than a true and loyal son of the Republic. His positisn during those trying years was tersely defined in a letter to a friend.

"I did all I could to help preserve the Union without a war, but after it began I thought there was but one thing to do, and that was to fight it out. I therefore sustained all constitutional measures that tended, in my judgment, to put down the rebellion. I never believed in the doctrine of secession."

He did not again enter upon active political life as a candidate until the year 1867, when he was nominated by the Democratic party as a candidate for Governor of Ohio. His opponent was Rutherford B. Hayes, who afterwards became President of the United States. Judge Thurman carried on a campaign of great activity, making speeches in nearly every county of the state, and also showed great skill in his management of the campaign. He was defeated by a plurality of only 2,800, in a state which the Republicans had carried at the previous election by over 40,000 majority.

What seemed to be a political reverse was in reality a victory

for Judge Thurman. The canvass had resulted in the election by the Democrats of a majority of the members of the general assembly. It was the duty of this legislature to elect a senator of the United States, to succeed Benjamin F. Wade. Judge Thurman was preferred by his party friends over Clement L. Vallandigham, and thus was opened for him a career of twelve years' duration in the greatest legislative body in the world. During all this service Judge Thurman was a member of the judiciary committee, as he was also in his younger years in the 29th congress, and a portion of the time he was its chairman. He won a reputation for judicial fairness and readiness, dignity and power in debate, especially upon all questions of constitutional law. He there met Roscoe Conkling, the great senator from New York, and they frequently measured swords in hot political debate. Notwithstanding this, each had for the other the highest respect and esteem. During a long legal argument, this senator repeatedly turned to Judge Thurman, and seemed to address his remarks to him alone. This performance was not agreeable to Judge Thurman, and feeling that Mr. Conkling was giving him too much attention, he asked somewhat excitedly and in an angry tone, "Does the senator from New York expect me to answer him every time he turns to me?" On the part of Mr. Conkling there was a momentary hesitation, and the people in the galleries, which were crowded, expected a scene. They were disappointed. Mr. Conkling, with the greatest courtesy replied, "When I speak of the law, I turn to the senator from Ohio as the Mussulman turnt toward Mecca. I turn to him as I do to the English common law, as the world's most copious fountain of human jurisprudence." This graceful compliment caused vigorous applause in the galleries. The anger of Judge Thurman was turned away, and he walked over to the Republican side of the chamber and shook hands with his opponent. The applause broke out afresh.

While a senator, Judge Thurman exercised a very influential part in shaping the legislation of that important period. Possibly the most valued work which he accomplished was an act to compel the Pacific railroad corporations to fulfil their obligations to the government, which since has been known as the "Thurman Act," and the passage of which he forced in spite of the combined influence of those companies. In this great work he was aided by his personal friend, Senator Edmonds, of Vermont.

I cannot better describe the esteem in which Judge Thurman was held in the senate by those of opposite political views, as well as

by his partisan associates, than by quoting the words of James G. Blaine. He wrote: Mr. Thurman's rank in the senate was established from the day he took his seat, and was never lowered during the period of his service. He was an admirably disciplined debater, fair in the method of his statement, logical in his argument, honest in his conclusions. He had no tricks of discussion, no catch phrases to secure attention, but was always direct and manly. His retirement from the senate was a serious loss to his party—a loss indeed to the body."

In November, 1872, the democratic party met with terrible defeat and many of its supporters were discouraged, disheartened and disgusted. Many of its friends reached the conclusion that its usefulness was ended, and that some new party should be built upon its ruins. In Ohio, in 1873, the movement took definite shape and a number of the leaders met, formulated their purpose to declare the party dead, and to announce its successor. They soon discovered that the help of senator Thurman, who had not been consulted, was necessary to give them an indorsement to the party at large. A committee was sent to interview the senator. He received them in his small and unpretentious office, heard them in silence, sat for a moment in deep reflection, and suddenly turning upon his visitors, said: "Gentlemen, this room is too small to break up the Democratic party in." The force of the expression may be excused because of its effect. The delegation withdrew, launched their party, but it lacked the support which Thurman could have given it, and it soon became one of the vanished things of American political history. In that year the democratic candidate for governor of Ohio was elected, and Mr. Thurman was returned to the senate.

In political life Judge Thurman was always an intense partisan, and yet to his political opponents he was always generous, courteous and just, and never resorted to anything but fair and lawful means to accomplish his purposes. Two men could not possibly be further apart in their political views, and more antagonistic to each other in this sense, than were Judge Thurman and the late senator Oliver P. Morton, of Indiana, and yet, I have never heard warmer words of friendship and admiration fall from the lips of one man about another, than those which I have heard Thnrman speak in regard to Morton.

In the democratic national conventions for 1876, 1880 and 1884, Judge Thurman was honored by being mentioned and voted for as a candidate for president. He was not made the nominee,

and I am sure that neither convention best served the country in rejecting his candidacy. In 1888 he was the nominee of the demoaratic party for vice-president, on the ticket with Grover Cleveland. Although seventy-five years of age, he did much active campaign work, making speeches, which delighted his partisans, not only in Ohio, but also in the West and in the East. He was defeated together with his party, and this was his last political work.

Judge Thurman tried his last cause before a jury in the winter and early in the spring of 1888. It was long drawn out, and lasted for a period of nine weeks. Election frauds had been committed in Franklin county by the changing of figures in tally sheets, so as to make it appear that certain candidates had been elected, when in fact they had been defeated. For this crime certain men had been indicted. The accused were members of Judge Thurman's party, but his abhorrence of the crime was so great and his belief that upon the punishment of such crimes, the existence and life of the Republic depended, was so strong that he did not hesitate to accept employment by the State. His old age and bodily infirmities might well have excused him, but these he did not plead. Day after day and week after week while suffering great bodily pain from rheumatism, he was constantly at his post in the court room. Never in all his life did he show more ability and skill in the management of a cause.

During the trial and in the final presentation to the jury, the skillful attorneys for the defendants seemed to seek to impress on the jury, on which there were many Democrats, the idea that the Democratic party was being attacked and was on trial. This he resented with great vigor in the following language:

"Nay, gentlemen, it is simply nonsense to say that. Mr. C. has explained the whole thing himself when he said there are bad men in every party. So there are. There are bad men in the Democratic party, bad men in the Republican party, and I should not be surprised if there are bad men even in the Prohibition party. If there is any party that has no bad men in it it must be the Women's Rights party. I cannot conceive of any other. If there are bad men in any party who commit a crime, is the party to be accountable for it? If a member of one of your churches in this city cheats his neighbor in a horse trade, is the whole church to do penance for that? If a man in your political party commits a crime, are you to go and seek absolution from that sin? I will tell you when a party does become responsible. When

a crime is committed by a member or members of a party and that party, instead of setting their faces like flint against the perpetrator of crime, seek to shield him, they take the responsibility on their own shoulders."

I shall never forget the closing words of that powerful argument as they fell from the lips of the venerable lawyer. They seemed to express the last best wish he could utter for the great party, which he had loved during all his life and which had greatly honored him. They were these:

"But I do want this party, to which I have belonged now more than sixty years, for I began when I was a child; this party which has done so much for me, and which I have conscientiously believed in; which has its faults, as all parties have had their faults; which has been wrong sometimes, as all parties have been wrong; but in which I have believed, to which my faith has been pledged and has been kept—I do want that party in the going down of the sun of my life, when I shall look for the last time abroad on the earth—I do want te see that party still standing, still respected, still honored and still deserving the good will and kindness and support of all my fellow-beings."

This was the thought, the aspiration of a true lover of his country and a statesman who had her well being at heart. In a country like ours, great parties are a necessity. Only by such organizations can the people act effectively, and make their will known. Upon their honesty and integrity depends the welfare of the Republic. What better guarantee can a man have in his dying hour for the future usefulness and happiness of his country, than to see his party still standing, still respected, still honored and still deserving the good will and kindness and support of all his fellow-beings?

To sum up the characteristics of Judge Thurman; He was a man of great bodily strength and vigor. He was endowed by nature with a keen, active and comprehensive brain, and this had been broadened and strengthened by constant and long-continued study. He was always a student. He was one of the most thorough scholars in public life. He was a great lawyer and also as great a judge. He was a statesman, who ever had his country's true interests at heart, and who never permitted his country's honor or his own to be tarnished by any act of his. The brightest gem in his crown was unswerving and unyielding honesty in public and private life. His proudest boast, and the only one he was ever heard to make was:

"I never, in all my life, knowingly wronged a human being of a dollar."

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NOTES.

The Kent County Citizen has started to publish reports of mandamus decisions of the supreme court in which no opinions have been filed. The scheme is an excellent one and should meet with approval of the bar of the state. The department containing these reports is under the charge of W. D. Fuller, the state reporter. The conscientious labor which distinguishes his work in the state reports, will not fail to make this departure a success.

A novel point has been raised in a case in the United States Circuit Court of Appeals. The case is entitled *Cahill* v. *C. M. & St. P. Ry. Co.* The judge in the lower court had directed the jury to find a verdict for the defendant. This one of the jury refused to do. In the opinion of Judge Woods of the appellate court, certain remarks are made which it is believed will tend to discourage any juror from considering his opinion as better than that of the trial judge. It says:

"The authority and duty of a jndge to direct a verdict for one party or the other, when, in his opinion, the state of the evidence requires it, is beyond dispute, and it is not for jurors to disobey, nor for attorneys to object, except in the orderly way necessary to save the right to prosecute a writ of error. The conduct of the juror in this instance was in the highest degree reprehensible, and might well have subjected him and any who encouraged him to persist in his course to punishment for contempt. His conduct was in violation of law, subversive of authority, and obstructive of the orderly administration of justice. In fact by his course he put in jeopardy

the interests which he assumed to protect, because it is only by treating the case as if the verdict had been returned that we have been able to review the judgment and to order a new trial. We deem it proper to observe here that it is not essential that there be a written verdict signed by jurors or a foreman, and we have no doubt that, in cases where the court thinks it right to do so, it may announce its conclusion in the presence of the jury and of the parties or their representatives, and direct the entry of a verdict without asking the formal assent of the jury. Until a case has been submitted to the jury for its decision upon disputed facts, the authority of the court for all purposes of the trial is at every step necessarily absolute, and its ruling upon every proposition, including the question whether upon the evidence the case is one for the jury, must be conclusive, until upon writ of error it shall be set aside. That remedy is provided by law, and presumably will be effective and adequate, if there be just ground for invoking it. Certainly the obstinacy of a conceited juror is not likely to prove a wholesome substitute."

LEGAL MISCELLANY.

The supreme court of Connecticut has very properly adopted a high standard in measuring the professional conduct of members of the bar of that state. Chief Justice Andrews of the supreme court of errors in a case instituted by the Fairfield county bar, to debar one Taylor for unprofessional conduct concludes his judgment as follows:

"It is not enough for an attorney that he be honest. He must be that and more. He must be believed to be honest. It is absolutely essential to the usefulness of an attorney that he be entitled to the confidence of the community wherein he practices. If he so conducts himself in his profession that he does not deserve that confidence,. he is no longer an aid to the court, nor a guide to his clients. A lawyer needs, indeed, to be learned. It would be well if he could be learned in all the learning of the schools. There is nothing to which the ingenuity of man has been turned that they may not become subject of his inquiries. Then, of course, he must be especially skilled in the books and the rules of his own profession. He must have prudence and tact to use his learning, and foresight and industry and courage. But all these may exist in a moderate degree, and yet he may be a creditable and useful member of the profession, so long as the practice is to him a clean and honest function. But possessing all these faculties, if once the practice becomes to him a mere brawl for hire; or a system of legal plunder, where craft and not conscience is the rule, and where falsehood and not truth are the means by which to gain his ends, then he forfeits all right to be an officer in any court of justice or to be numbered among the members of an honorable profession."—*Ohio Legal News.*

Looked at as a matter of procedure, the Jameson trial is an episode of which everyone who bore a part in it has a right to be proud. The case for the prosecution was conducted with a consummate union of fairness and ability. Every point that could be urged on behalf of the defendants was urged in a manner worthy of the highest traditions of the English Bar; while the Lord Chief Justice discharged his very difficult duties with a courtesy, a firmness, and a dignity above all praise. There were no scenes. The Bench was not converted into the likeness of a dress circle in a

theatre during the performance of a tragi-comedy, and not the least satisfactory incident was the touching acquiescence of the defendants themselves in the consequences of their misguided, though honest and courageous, zeal.

The result of the case politically and internationally is of great importance, as it saves the country from the humiliating position of having to confess that Charterland is outside her Majesty's dominions and the Foreign Enlistment Act inadequate to punish British subjects conducting raids, from whatever motive, into friendly, if vassal, states. The decision of the defendants not to seek a new trial is also so much to the good, as it puts an end to the legal and technical questions involved in the case, and leaves the fate of the accused to the conjoint clemency of the two states affected by the expedition. To a certain extent the rulings of the court merit political rather than legal commendation, and the existence of Orders in Council under the Foreign Jurisdiction Acts with reference to Charterland might well have led lawyers to conclude that its area was not within Her Majesty's dominions, but merely under British influence; a sort of second Transvaal. The sooner annexation proclamations are made as to the whole of the territory, the better for our international position.—*The Law Journal, (London, Eng.)*

The financial controversy, which this year gives life and vigor to the presidential contest, makes such cases as *Blank* v. *Sadlin, 38 N. Y. Supp. 817*, decided by the Supreme Court of New York, of more than ordinary interest. It appeared in that case that a purchaser at a receiver's sale of real estate found that there was a mortgage resting upon the property, payable "in gold coin of the United States of America, of the present standard of weight and fineness." The plaintiff objected to the title tendered to him by the receiver, upon the ground that this provision in the mortgage as to payment imposed an additional burden upon the property, which entitled him to refuse to complete his purchase. The court, after holding that the receiver's title is a title in a judicial proceeding, and that the receiver was acting as the officer of the court, touched upon the financial question by holding that it was not proven that the purchaser of the property would be put to an additional expense or burden in obtaining such kind of money, or that the value of the property subject to a mortgage, specifically payable in gold, would be affected, or that such an incumbrance upon the property would be more onerous than that of a mortgage which did not specify any particular kind of money as necessary to discharge the lien. "The laws of the United States," said the court, "make gold and silver legal tender, but only such gold and silver as has been coined into money by the United States. Since the resumption of specie payment by the United States in 1878 it has been declared to be the policy of the government to maintain at an equality all of the var-

ious kinds of money—gold, silver and legal tender notes made by the laws of the United States legal tender for the payment of debts. Such having been the declared policy of the United States, and all contracts made having been based upon such declared policy—that the various kinds of money which have been made legal tender for the payment of debts are of equal value—a court can hardly assume that the government of the United States will reverse its policy, and by a debasement of its currency, or repudiation of its notes and obligations, justify and approve a repudiation of obligations and contracts entered into a pursuance of its laws relying upon its declared policy. This plaintiff was entitled to a conveyance of the property purchased, subject to a mortgage of $16,000. Whether that mortgage was specifically payable in silver dollars of the United States, gold dollars of the United States, or legal tender notes of the United States, imposed no additional burden upon the owner of the property, so long as each was maintained by the government at an equality. And although the relative value of the amount of metal coined, under the laws of the United States, in silver and gold dollars, may have changed, such change has not affected, and cannot affect, the real value of the dollar, so long as the government, in which by the constitution, is vested the power to coin money, preserves them at an equality and gives to each the equality that has been maintained since the government of the United States assumed to coin money.

* * In the absence of any evidence tending to show that gold coin is of greater value than any other of the various kinds of money made a legal tender by law, there is absolutely nothing upon which a court can base a finding that the fact that this mortgage was payable in gold coin imposed any greater obligation upon the purchaser of the property, or exposed the property to any greater incumbrance, than would a mortgage simply payable in money, without specifying the particular kind of money." The court held that the purchaser was not justified in rejecting the title, but Van Brunt, P. J., dissented, holding that when a man contracts to pay for property, he may pay in any legal tender, and when he takes the property subject to an obligation, he may discharge it in any kind of legal tender; that the purchaser therefore would be relieved because the obligation of the mortgage is to pay in gold coin.—*Central Law Journal.*

RECENT MICHIGAN DECISIONS.

CORPORATION LAW—RATIFICATION OF ACTS OF AGENT—ULTRA VIRES.—A corporation will be held to have ratified the act of its agent in purchasing a claim where if it is shown that the contract has enured to its benefit and that they have received and retained, by reason of the contract, a large amount of property.

A corporation cannot avail itself of the defense of ultra vires when the contract has been made in good faith, fully performed by the other party and the corporation has had the full benefit of the performance and the contract. *Clement, Bane & Co.*, v. *Michigan Clothing Company.* July 28, 1896.

LEASE OF FARM—CO-TENANCY—SHARE IN PROFITS—EVIDENCE—CONVERSION—DISABILITY OF PROPERTY.—1. A contract entered into for the renting of a farm under which each of the parties is to bear one-half the expense and each is to have a joint and equal interest in the profits, will not constitute the parties partners. As to the products of the farm the parties are co-tenants.

2. The provision in the contract that the produce of the farm should be equally divided must be read in connection with the provision that each should furnish one-half of the grain sowed, and cannot be construed to allow plaintiff a share in the grain which he did not himself sow.

3. There was evidence which would warrant a recovery by plaintiff for services rendered prior to the execution of the contract.

4. It was not error for the court to allow a recovery for the services of plaintiff in delivering milk in which had an equal interest.

5. A finding by the jury that defendant excluded the plaintiff from his rights in the property as co-tenant, and denied his right to the same, would render a technical demand unnecessary.

6. An assertion of ownership in entirety by a tenant in common in possession of personal property, as against his co-tenant, coupled with a refusal to allow the latter to hold at all, amounts in legal effect to a conversion. *Williams* v. *Rogers.* July 28, 1896.

MARRIED WOMAN—CONTRACT—LIABILITY ON SUBSCRIPTION.—In an action to recover the amount due on a subscription, the defendant, by failing to file an affidavit denying the subscription, must be held to have admitted its execution under Court Rule 79.

An executory contract made by a married woman, by which she agrees to donate money for any enterprise, public or private, which may incidentally benefit her property, is not enforcible. Grant and Moore, JJ., dissent. *Detroit Chamber of Commerce* v. *Goodman.* July 31, 1896.

RAILROAD CROSSING—ELECTRIC BELL—CONTRIBUTORY NEGLIGENCE.—In an action to recover for the alleged negligent killing of decedent at a railway crossing, where it appeared that decedent, who was familiar with the crossing and knew that an electric bell placed at the crossing for the purpose of warning the public of an approaching train, was apt to get out of order and fail to ring, drove across the crossing without exercising any precaution to look for approaching trains, he must be held to have been guilty of such contributory negligence as would defeat recovery. *Tobias* v. *Michigan Central Railroad Company.* July 28, 1896.

RAILROAD CROSSING—NEGLIGENT KILLING—CONTRIBUTORY NEGLIGENCE.—In an action to recover for the alleged negligent killing of decedent at a railway crossing, recovery could not be had upon the ground that, having been suddenly placed in a dangerous position through the negligence of defendant, a failure to select the wisest course to escape therefrom, would not constitute contributory negligence, it appearing that plaintiff's intestate, who was perfectly familiar with the streets, was

driving a horse which was thoroughly manageable and that she and her companion exercised no care or caution whatever in approaching the crossing. *Richfield* v. *Michigan Central Railroad Company*. July 28, 1896.

SCHOOL BOARD—AGENCY—RATIFICATION—ESTOPPEL.—Where a person is employed for a corporation by one assuming to act in its behalf, and goes on and renders the services according to the agreement, with the knowledge of its officers, and without notice that the contract is not recognized as binding, such corporation will be held to have sanctioned and ratified the contract. Having availed itself of the services and received the benefits, it is bound in conscience to pay and will not be heard to say that the original agreement was not made by a person legally authorized to contract. *Jones* v. *School District No. 3*. July 28, 1896.

SERVICES RENDERED TO DECEDENT—EVIDENCE—ARGUMENT.—In an action to recover for services rendered decedent, the testimony regarding the existence of an agreement between the claimant and decedent, as to the former's receiving compensation, was sufficiently definite to warrant the submission of the case to the jury.

It was not error to admit, in support of the claim, the testimony of witnesses who were shown to be possessed of a general knowledge of the condition of decedent and the necessities for and kind of care furnished for a long period and who were apparently as familiar with all the circumstances as any other than decedent and claimant; the witnesses having testified to what they knew, and based their estimate upon the condition described, which afforded the jury an opportunity to judge of the value of such services.

The appellate court will not interfere with the exercise of the discretion of the trial judge in relation to the language of counsel, unless the injury is apparent or the abuse very great. *Lathrop* v. *Sinclair*. July 28, 1896.

STATUTE OF LIMITATIONS—ACTION AGAINST BONDSMEN—DEMAND.—Where one furnishes goods under contract, the purchase price to be paid in installments, the statute of limitations begins to run as soon as a payment becomes due thereunder.

Laborers and material men may under the statute sue the officers of a school board at any time when a debt is due from the contractor to them. These rights do not depend upon the terms of the contract between the builder and official board. *Staffon* v. *Lyon*. July 21, 1896.

VOLUNTARY DEED—REFORMATION—Equity will not interfere, in behalf of a mere volunteer, to reform a deed, of which there is no proof of acceptance, and for which no consideration was promised or paid. *Thompson* v. *Westover*. July 31, 1896.

WILL—ELECTION—OCCUPANCY BY WIDOW AFTER NOTICE OF ELECTION—RIGHT OF REMAINDER MAN.—Where a widow who is given a life estate in the lands of her deceased husband files her declination to take under the will, but takes no further steps to have her dower interest assigned and occupies the premises without any objection on the part of any of the heirs; such holding cannot be construed as adverse to one who was given the remainder by the will. *Lumley* v. *Haggerty, et al.* July 31, 1896.

WILL—SEC. 5538 HOW. STAT. CONSTRUED—MEANING OF WORD "ANCESTOR."—The will in question bequeathed real estate to James Phillips conditioned on his paying certain money and contained the further clause, "and if James Phillips should die without heirs, then my real and personal estate is to go to my daughters, Mary and Jane." The only question in controversy is, who took the fee to the real estate under the will.

Held, that James Phillips, took the fee, defeasible at his death without issue, living at that time.

Howell's Statutes, section 5538, reads: "When a remainder shall be limited to without heirs, or heirs of his body, or without issue, the words heirs or issue, shall be construed to mean heirs or issue living at the death of the person named as ancestor." "The person named as ancestor" must be construed as meaning the person named by the testator as the ancestor; in the present case James Phillips, and he having died without issue, the fee by the terms of the will was cast upon the sisters Mary and Jane, and they having died without issue, Elizabeth Clark, "the other sister" mentioned in the will, took the fee. *Mulree* v. *Clark*. July 21, 1896.

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INTERNATIONAL LAW.

An Address by Right Hon: Lord Russell, Lord Chief Justice of England, before the American Bar Association.

MR. PRESIDENT:

My first words must be in acknowledgment of the honor done me, by inviting me to address you on this interesting occasion. You are a congress of lawyers of the United States met together to take counsel, in no narrow spirit on questions affecting the interests of your profession; to consider necessary amendments in the law which experience and time develop; and to examine the current of judicial decisions and of legislation, state and federal, and whither that current tends. I, on the other hand, come from the judicial bench of a distant land, and yet I do not feel that I am a stranger amongst you, nor do you, I think, regard me as a stranger. Though we represent political communities which differ widely in many respects, in the structure of their constitutions and otherwise, we yet have many things in common.

We speak the same language, we administer laws based on the same juridicial conceptions, we are co heirs in the rich traditions of political freedom long established and, we enjoy in common a literature, the noblest and the purest the world has known—an accumulated store of centuries to which you, on your part, have made generous contribution. Beyond this, the unseen "crimson thread" of

kinship, stretching from the mother Islands to your great continent, unites us, and reminds us always that we belong to the same, but a mixed, racial family. Indeed the spectacle which we, to-day, present is unique. We represent the great English speaking communities—communities occupying a large space of the surface of the earth—made up of races wherein the blood of the Celt and Saxon, of Dane and Norman, of Pict and Scot, are mingled and fuse into an aggregate power held together by the nexus of a common speech—combining at once territorial dominion, political influence and intellectual force greater than history records in the case of any other people.

This consideration is prominent amongst those which suggest the theme on which I desire to address you—namely, international law.

The English-speaking peoples, masters not alone of extended territory, but also of a mighty commerce, the energy and enterprise of whose sons have made the greatest travelers and colonizers of the world—have interests to safeguard in every quarter of it, and, therefore, in an especial manner it is important to them, that the rules which govern the relations of states inter se should be well understood and should rest on the solid bases of convenience, of justice of reason. One other consideration has prompted the selection of my subject. I knew it was one which could not fail, however imperfectly treated, to interest you. You regard with just pride the part which the judges and writers of the United States have played in the development of international law. Story, Kent, Marshall, Wheaton, Dana, Woolsey, Halleck and Wharton, amongst others compare not unfavorably with the workers of any age, in this province of jurisprudence.

International law, then, is my subject. The necessities of my position restrict me to, at best, a cursory and perfunctory treatment of it.

I propose briefly to consider what is international law; its sources; the standard—the ethical standard—to which it ought to conform; the characteristics of its modern tendencies and developments, and then to add some (I think) needful words on the question, lately so much discussed, of international arbitration.

I call the rules which civilized nations have agreed shall bind them on their conduct inter se, by the Benthamite title, "International Law." And here, Mr. President, on the threshold of my subject I find an object in my way. My right so to describe them

is challenged. It is said by some that there is no international law, that there is only a bundle, more or less confused, of rules to which nations more or less conform, but that international law there is none. The late Sir James F. Stephens takes this view in his "History of the Criminal Law of England," and in the celebrated "Franconia" case (to which I shall hereafter have occasion to allude), the late Lord Coleridge speaks in the same sense. He says: "Strictly speaking, 'International Law' is an inexact expression, and it is apt to mislead if its inexactness is not kept in mind. Law implies a lawgiver and a tribunal capable of enforcing it and coercing its transgressors." Indeed it may be said that with few exceptions the same note is sounded throughout the judgments in that case. These views, it will at once be seen, are based on the definition of law by Austin in his "Province of Jurisprudence Determined," namely, that a law is the command of a superior who has coercive power to compel obedience and punish disobedience. But this definition is too narrow; it relies too much on force as the governing idea. If the development of law is historically considered, it will be found to exclude that body of customary law which in early stages of society precedes law which assumes, definitely, the character of positive command coupled with punitive sanctions. But even in societies in which the machinery exists for the making of law in the Austinian sense, rules or customs grow up which are laws in every real sense of the word, as for example, the law merchant. Under later developments of arbitrary power, laws may be regarded as the command of a superior with a coercive power in Austin's sense: Quod placuit principi legis vigorem habet. In stages later still, as government became more frankly democratic, resting broadly on the popular will, laws bear less the character of customary law founded on consent. Savigny, indeed, says of all law, that it is first developed by usage and popular faith, then by legislation, and always by internally silently operating powers, and not mainly by the arbitrary will of the lawgiver.

I claim, then, that the aggregate of the rules to which nations have agreed to conform in their conduct towards one another are properly to be designated "International Law."

The celebrated author of "Ecclesiastical Polity," the "judicious" Hooker, speaking of the Austinians of his time, says: "They who are thus accustomed to speak apply the name of law unto that only rule of working which superior authority imposeth, whereas we, somewhat more enlarging the sense thereof, term every kind of a

rule or canon whereby actions are famed a law." I think it cannot be doubted that this is near to the true and scientific meaning of law.

What, then, is international law?

I know no better definition of it than that it is the sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another.

Is this accurate and exhaustive? Is there any a priori rule of right or of reason or of morality which, apart from and independent of the consent of nations, is part of the law of nations? Is there a law which nature teaches, and which, by its own force, forms a component part of the law of nations? Was Grotius wrong when to international law he applied the test "placuit ne Gentibus"?

These were points somewhat in controversy between my learned friend, Mr. Carter, and myself before the Paris Tribunal of Arbitration in 1893, and I have recently received from him a friendly invitation again to approach them—this time in a judicial rather than in a forensic spirit. I have reconsidered the matter, and, after the best consideration which I can give to the subject, I stand by the proposition which in 1893 I sought to establish. That proposition was that international law was neither more nor less than what civilized nations have agreed shall be binding on one another as international law.

Appeals are made to the law of nature and the law of morals, sometimes as if they were the same things, sometimes as if they were different things, sometimes as if they were in themselves international law, and sometimes as if they enshrined immutable principles which were to be deemed to be not only part of international law, but, if I may so say, to have been preordained. I do not stop to point out in detail how many different meanings have been given to these phrases—the law of nature and the law of morals. Hardly any two writers speak of them in the same sense. No doubt appeals to both are to be found scattered loosely here and there in the opinions of continental writers.

Let us examine them.

What is the law of nature?

Moralists tell us that for the individual man life is a struggle to overcome nature, and in early and what we call natural or barbarous states of society the arbitrary rule of force and not of abstract right or justice is the first to assert itself. In truth, the initial difficulty is to fix what is meant by the law of nature. Gaius speaks of it as

being the same thing as the Jus Gentium of the Romans, which, I need not remind you, is not the same thing as Jus inter Gentes. Ulpian speaks of the Jus naturale as that in which men and animals agree. Grotius uses the term as equivalent to the Jus stricte dictum, to be completed in the action of a good man or state by a higher morality, but suggesting the standard to which law ought to conform. Pufendorf in effect treats his view of the rules of abstract propriety, resting merely on unauthorized speculations, as constituting international law and acquiring no additional authority from the usage of nations, so that he cuts off much of what Grotius regards as law. Ortolan, in his "Diplomatie de la Mer,' cites with approval the following incisive passage from Bentham, speaking of so-called natural rights springing from so-called natural law:

"Natural right is often employed in a sense opposed to law, as when it is said, for example, that law cannot be opposed to natural right, the word "right" is employed in a sense superior to law, a right is recognized which attacks laws, upsets and annuls it. In this sense, which is antagonistic to law, the word 'droit' is the greatest enemy of reason, and the most terrible destroyer of government.

"We cannot reason with fanatics armed with a natural right, which each one understands as he pleases, applies as it suits him, of which he will yield nothing, withdraw nothing, which is inflexible, at the same time that it is unintelligible, which is consecrated in his eyes like a dogma, and which he cannot discard without a cry. Instead of examining laws by their results, instead of judging them to be good or bad, they consider them with regard to their relation to this so-called natural right. That is to say, they substitute for the reason of experience all the chimeras of their own imagination."

Austin, also in his work on Jurisprudence, already mentioned, and referring to Pufendorf and others of his school, says:

"They have confounded positive international morality or the rules which actually obtain amongst civilized nations in their mutual intercourse, with their own vague conceptions of international morality, as it ought to be, with that indeterminate something which they call the law of nature. Professor von Martens of Gottingen is actually the first of the writers on the law of nations, who was seized this distinction with a firm grasp; the fist who has distinguished the rules which ought to be received in the intercourse of nations, or, which would be received if they conformed to an assumed standard of whatever kind, from those which are so

received; endeavored to collect from the practice of civilized communities what are the rules actually recognized and acted upon by them, and gave to these rules the name of positive international law."

Finally Woolsey, speaking of this class of writers, says they commit the fault of failing to distinguish sufficiently between natural justice and the law of nations, of spinning the web of a system out of their own brains as if they were the legislators of the world, and of neglecting to inform us what the world actually holds the law to be by which nations regulate their conduct. So much for the law of nature.

What are we to say of the appeal to the law of morality?

It cannot be affirmed that there is a universally accepted standard of morality. Then what is to be the standard? The standard of what nation? The standard of what nation and in what age?

Human society is progressive—progressive let us hope, to a higher, a purer, a more unselfish ethical standard. The Mosaic law enjoined the principle of an eye for an eye, a tooth for a tooth. The Christian law enjoins that we love our enemies, and that we do good to those who hate us. But more. Nations, although progressing, let us believe, in the sense which I have indicated, do not progress pari passu. One instance occurs to me pertinent to the subject in hand.

Take the case of privateering. The United States is to-day the only great power which has not given its adhesion to the principle of the declaration of Paris of 1856, for the abolition of privateering. The other great nations of the earth have denounced privateering as immoral, and as the cover and the fruitful occasion of piracy. I am not at all concerned to discuss, in this connection, whether the United States were right or were wrong. It would not be pertinent to the point; but it is just to add that the assenting powers had not scrupled to resort to privateering in past times, and also that the United States declared their willingness to abandon the practice if more complete immunity of private property in time of war were secured.

Nor do nations, even when they are agreed on the inhumanity and immorality of given practices, straightway proceed to condemn them as international crimes. Take as an example of this, the slave trade. It is not too much to say that the civilized powers are abreast of one another in condemnation of the traffic in human

beings as an unclean thing—abhorrent to all principles of humanity and morality, and yet they have not yet agreed to declare this an offense against the law of nations. That it is not so has been affirmed by English and American judges alike. Speaking of morality in connection with international law, Professor Westlake, in his "Principles of International Law," acutely observes that while the rules by which nations have agreed to regulate their conduct inter se, are alone properly to be considered international law, these do not necessarily exhaust the ethical duties of states one to another, any more, indeed, than municipal law exhausts the ethical duties of man to man; and Dr. Wendell has remarked of jural laws in general that they are not (and perhaps it is not desirable that they should be) coextensive with morality. He says the adjective right belongs to the domain of morality; the substantive right to the domain of law.

The truth is that civilized men have at all times been apt to recognize the existence of a law of morality, more or less vague and undefined, depending upon no human authority and supported by no human external sanction other than the approval and disapproval of their fellowmen, yet determining, largely, for all men and societies of men what is right and what is wrong in human conduct, and binding, as is sometimes said, in foro conscientiae. This law of morality is sometimes treated as synonymous with the natural law, but sometimes the natural law is regarded as having a wider sphere, including the whole law of morality. It cannot be said either of international law or of municipal law that they include the moral law, not accurately or strictly that they are included within it. It is a truism to say that municipal law and international law ought not to offend against the law of morality. They may adopt and incorporate particular precepts of the law of morality; and on the other hand, undoubtedly, that may be forbidden by the municipal or international law, which in itself is in no way contrary to the law of morality or of nature. But whilst the conception of the moral law or law of nature precludes the idea of dependence on human authority, it is of the essence of municipal law that its rules have been either enacted or in some way recognized as binding by the supreme authority of the state (whatever that authority may be), and so also it is of the essence of international law that its rules have been recognized as binding by the nations constituting the community of civilized mankind.

We conclude then that, while the aim ought to be to raise high

its ethical standard, international law, as such, includes only so much of the law of morals or of right reason or of natural law (whatever these phrases may cover), as nations have agreed to regard as international law.

In fine, international law is but the sum of those rules which civilized mankind have agreed to hold as binding in the mutual reactions of states. We do not indeed find all these recorded in clear language—there is no international code. We look for them in the long records of customary action; in settled precedents; in treaties affirming principles; in state documents; in declarations of nations in conclave—which draw to themselves the adhesion of other nations; in declarations of text writers of authority generally accepted, and lastly, and with most precision, in the field which they cover, in the authoritative decisions of prize courts. I need hardly stop to point out the great work under the last head accomplished, under others, by Marshall and Story in these states, by Lord Stowell in England and by Portalis in France.

From these sources we get the evidence which determines whether or not a particular canon of conduct, or a particular principle, has or has not received the express or implied assent of nations. But international law is not as the twelve tables of ancient Rome. It is not a closed book. Mankind are not stationary. Gradual change and gradual growth of opinion are gradually going on. Opinions, doctrines, usages, advocated by acute thinkers are making their way in the world of thought. They are not yet part of the law of nations. In truth, neither doctrines derived from what is called the law of nature (in any of its various meanings) nor philanthropic ideas, however just or humane, nor the opinions of text writers, however eminent, nor the usages of individual states—none of these, nor all combined, constitute international law.

If we depart from the solid ground I have indicated, we find ourselves amid the treacherous quicksands of metaphysical and ethical speculation; we are bewildered, particularly by the French writers in their love for "un systeme," and perplexed by the obscure subleties of writers like Hautefeuille with his Loi primitive and Loi secondaire. Indeed it may, in passing, be remarked that history records no case of a controversy between nations having been settled by abstract appeals to the laws of nature or of morals.

But while maintaining this position, I agree with Woolsey when he says that if international law were not made up of rules for which reasons could be given, satisfactory to a man's intellectual and

moral nature, it would not deserve the name of a science. Happily those reasons can be given. Happily men and nations propose to themselves higher and still higher ethical standards. The ultimate aim in the actions of men and of communities ought, and I presume will be admitted, to be to conform to the divine precept, "Do unto others as you would that others should do unto you."

I have said that the rules of international law are not to be traced with the comparative distinctness with which municipal law may be ascertained—although even this is not always easy. I would not have it, however, understood that I should to-day advocate the codification of international law. The attempt has been made, as you know, by Field, in this country, and Professor Bluntschli, of Heidelberg, and by some Italian jurists, but has made little way toward success. Indeed, codification has a tendency to arrest progress. It has been so found, even where branches or heads of municipal law have been codified, and it will at once be seen how much less favorable a field for such an enterprise international law presents, where so many questions are still indeterminate. After all it is to be remembered that jural law in its widest sense, is as old as society itself; ubi societas ibi jus est; but international law, as we know it, is a modern invention. It is in a state of growth and transition. To codify it would be to crystalize it; uncodified it is more flexible, and more easily assimilates new rules. While agreeing, therefore, that indeterminate points should be determined and that we should aim at raising the ethical standard, I do not think we have reached the point at which codification is practicable, would be a public good.

Let me give you an analogy. Amongst the most successful experiments in codification, in English communities have been those in Aglo-India, particularly the penal code and the Codes of Criminal and Civil Procedure. Prompted by their comparative success, Sir Roland Wilson urged the extension of the process of codification to those traditional unwritten native usages, or customary law, of Hindo or Mohomedan origin, still recognized in the government of India by Englishmen. But the wiser opinion of Indian experts was, that it was better not to persevere in the attempt. Many of these usages, by sheer force of contact with European life and habits of thought are falling into desuetude. The hand of change is at work upon them, and to codify them would be to stop the natural progress of disintegration.

As we are not to-day considering the history of international

law, I shall say but a word as to its rise, and then pass on to the consideration of its later developments and tendencies.

Like all law, in the history of human societies, it begins with usage and custom, and unlike municipal law, it ends there. When, after the break up of the Roman empire the surface of Europe was partitioned and fell under the rule of different sovereigns, the need was speedily felt for some guiding rule of international conduct. International law was in a rudimentary stage; it spoke with ambiguous voice, it failed to cover the whole ground of doubtful action. It needed not only an interpreter of authority, but one who should play at once the part of mediator, arbiter and judge. The Christian religion has done much to soften and humanize the action of men and of nations, and the papal head of sendom became, after the disruption of the Roman Empire, the interpreter and almost the embodiment of international law. The popes of the middle ages determined many a hot dispute between rival forces without loss of human life. Their decrees were widely accepted. Their action however, at the best, could not adequately supply the place of a rule of conduct to which all might indifferently appeal. And when, later, with the reformation movement, the time came when the pope could not command recognition as the religious head of a united christendom, the necessity of the time quickened men's brains and, under the fostering care of the jurists of many lands, there began to emerge a system which gave shape and form to ideas generally received and largely acted on by nations.

What Sir James Stephens has eloquently said of religion may truly be predicated of international law. The jurists set to music the tune which was haunting millions of ears. It was caught up, here and there, and repeated till the chorus was thundered out by a body of singers able to drown all discords and to force the vast unmusical mass to listen to them.

Although Hugo de Groot is regarded as the father and founder of international law; he was preceded by two men, born into the world forty years before him, namely, Ayala (the Spanish Judge-Advocate with the army of the Prince of Parma) and Suarez, (a Jesuit priest, also a Spaniard) both born in 1548, whose labors ought not to be forgotten.

Suarez in his "De Legibus et Deo Legislatore," and Ayala in his "De Jure et Offici is Bellicis et Diciplina Militari," his done good work.

Saurez, from the point of view of the Catholic theologian, as-

sumes that the principles of the moral law are capable of complete and authoritative definition and are supported by the highest spiritual sanction. He therefore treats of the lex naturalis as a definite substantive law, sufficient and complete in its own sphere and binding on all men. But he regards international law as a code of rules dealing with matters outside the sphere of the natural law—matters not strictly right or wrong in themselves, but becoming so only by virtue of the precepts of the law which he considers to be founded upon the generally recognized usages of nations. In the following passage, which is interesting from the singular modernness of its spirit, he explains his view of the origin of international law:

"The foundation of the law of nations lies in this, that the human race, although divided into various peoples and kingdoms, has always a certain unity, which is not only the unity of species, but also political and moral; as is shown by the natural precept of mutual love and pity, which extend to all the peoples, however foreign they may be to one another, and whatever may be their character and constitution. From which it follows that although any state, whether a republic or kingdom, may be a community complete in itself it is nevertheless a member of that whole which constitutes the human race; for such a community is never so completely self sufficing but that it requires some mutual help and intercourse with others, sometimes for the sake of some benefit to be obtained, but sometimes, too, from the moral necessity and craving which are apparent from the very habits of mankind.

"On this account, therefore, a law is required by which states may be rightly directed and regulated in this kind of intercourse with one another. And although to a great extent this may be supplied by the natural law, still not adequately nor directly, and so it has come about that the usages of states have themselves led to the establishment of special rules. For, just as within an individual state custom gives rise to law, so for the human race as a whole, usages have led to the growth of the laws of nations; and this the more easily, inasmuch as the matters with which such law deals are few and are closely connected with the law of nature, from which they may be deducted by inferences which, though not strictly necessary, so as to constitute laws of absolute moral obligation, still are very conformable and agreeable to nature, and therefore readily accepted by all."

Nor ought we to overlook the work of a writer even earlier than these. I mean Franciscus a victoria. Hall says of him that his

writings in 1533 mark an era in the history of international ethics. Spain claimed, largely by virtue of Papal grant and warrant, to acquire the territory and the mastery of the semi-civilized races of America. He denied the validity of the Papal title; he maintained the sovereign rights of the aboriginal races, and he claimed to place international relations upon the basis of equal rights as between communities in actual possession of independence. In other words, he, first, clearly affirmed the juridical principle of the complete international equality of independent states, however disproportionate their power.

Grotius undoubtedly had had the field of international relations explored by these, amongst other writers who had preceded him, but to him is certainly due the credit of evolving in his "De Jure Belli ac Pacis," a coherent system of law for the aggregation of states.

But I turn from this interesting line of thought to consider, first, the part played by the United States in shaping the modern tendencies of international law, and, next, whither those tendencies run. I have already spoken of the international writers of whom you are justly proud. It is not too much too say that the undoubted stream of tendency in modern international law to mitigate the horrors of war, to humanize or to make less inhuman its methods, and to narrow the area of its consequential evils, is largely due to the policy of your statesmen and the moral influence of your jurists.

The reason why you thus, in your young history, as an independent power, took so leading and noble a part in the domain of international law is not far to seek; it is at once obvious and interesting.

In the first place, you were born late in the life of the world, into the family of nations. The common law of England you had indeed imported and adopted as colonists in some of the states, but subject as you then were to the mother country, you had no direct interest or voice in the international relations, which were entirely within the domain of the sovereign power. But when you asserted your independence, the laws of the family of nations, of which you then became a member, were bound up with and became in part the justification for your existence as a sovereign power, and assumed for you importance and preeminence beyond the common law itself. Further, your remoteness from the conflicts of European powers and the wisdom of your rulers in devoting their energies to the consolidation and development of human affairs gave to your people a special concern in that side of international law which affects the

interests, rights and obligations of neutrals; and thus, it has come to pass that your writers have left their enduring mark on the law of nations touching allegiance, nationality, neutralism and neutrality, although as to these there are points which still remain indeterminate.

It is substantially true to say that while to earlier writers is mainly due the formulation of rules relating to a state of war, to the United States—to its judges, writers and statesmen, we largely owe the existing rules which relate to a state of peace and which affect the rights and obligations of powers, which, during a state of war, are themselves at peace.

On the other hand, while in Great Britain, writers of great distinction on international law are not wanting, and while the judges of her Prize Courts have done a great work in systematizing and justifying, on sound principles, the law of capture and prize, it is true to say that British lawyers did not apply themselves, early, or with great zeal, to the consideration of international jurisprudence.

Nor, again, is the reason far to seek. Great Britain had existed for centuries before international law, in the modern sense, came into being. The main body of English law was complete. The common law, springing from many sources, had assumed definite and comprehensive proportions. It sufficed for the needs of the time. Neither English statesmen nor English lawyers experienced the necessity which was strongly felt on the continent of Europe—the constant theater of war—for the foundation of rules of international conduct.

The need for these was slowly forced upon England, and, it is hardly too much to say that, to the British admiral, accustomed to lord it on the high seas, international law at first came, not as a blessing and an aid, but, as a perplexing embarrassment.

Notwithstanding all this, there is a marked agreement between the English and American writers as to the manner in which international law is treated. They belong to the same school—a school distinctly different from that of writers on the continent of Europe. The essential difference consists in this: Whereas in the latter, what I shall call the ethical and metaphysical treatment is followed, in the former, while not ignoring the important part which ethics play in the consideration of what international law ought to be, its writers for the most part carefully distinguish between what is, in fact, international law from their views of what the law ought

to be. Their treatment is mainly historical.

By most continental writers, and by none more than Hautefeuille what is, and what he thinks ought to be, law, theory and fact, law and so called rules of nature and of right, are mixed up in a way at once confusing and misleading.

One distinguished English writer, indeed, the late Sir Henry Maine, thought that he had discovered a fundamental difference between English and American jurists as to the view taken of the obligation of international law.

His opinion was based on the judgments of the English judges in the celebrated Franconia case, in which it was held that the English courts had no jurisdiction to try a foreigner for a crime committed on the high seas although within a marine league from the British coast. The case was decided in 1876, and is reported in 2d volume of the Law Reports, Exchequer Division, p. 63. The facts were these: The defendant was Captain Keyn, a German subject, in charge as captain of the German steamship, Franconia. When off Dover the Franconia, at a point within two and a half miles of the beach, ran into and sank a British steamer, Strathclyde, thereby causing loss of life. The facts were such as to constitute, according to English law, the crime of manslaughter, of which the defendant was found guilty by the jury, but the learned judge who tried the case at the Central Criminal Court reserved, for further consideration by the court, for crown cases reserved, the question whether the Central Criminal Court had jurisdiction over the defendant, a foreigner, in respect of an offense committed by him on the high seas, but within a marine league of the shore. All the members of the court were of opinion that the chief criminal courts, that is to say, the Courts of Assiz and the Central Criminal Court, were clothed with jurisdiction to administer justice in the bodies of counties, or, in other words, in English territory; and that from the time of Henry VIII a court of special commissioners, and, later the Central Criminal Court, (in which the defendant had been tried) had been invested by statute with the jurisdiction previously exercised by the Lord High Admiral on the high seas. But the majority held that the marine league belt was not part of the territory of England, and therefore not within the body of counties, and also that the admiral had no jurisdiction over foreigners on the high seas. The minority, on the other hand, held that the marine belt was part of the territory of England, and that the admiral had had jurisdiction over foreigners within those limits.

While I do not say that I should have arrived at the conclusions of historical fact of the majority, I am by no means clear that the judges of the United States, accepting the same data as did the majority of the English judges, would not have decided in the same way. But however this may be, the views of the majority do not seem to me to warrant the assumption of Sir Henry Maine that the case fundamentally affects the view taken of the authority of international law.

What it does incidentally reveal is a constitutional difference between the United States and Great Britain as to the methods by which the municipal courts acquire, at least in certain cases, jurisdiction to try and punish offenses against international law.

An example of that difference is ready to hand. Improved and stricter views of neutral duties constitute one of the great developments of recent times.

These views were (for reasons to which I have already averted) adopted earlier and more fully in the United States than in England. What was thereupon the action of the executive? No sooner had Washington, as president, and Jefferson, as secretary of state, promulgated the rules of neutrality, by which they intended to be guided, than they caused Gideon Henfield, an American citizen, to be tried for taking service on board a French privateer, as being a criminal act, because in contravention of those rules. Political feeling procured an acquittal in spite of the judge's discretion.

Later, no doubt, congress passed the act of 1794, making such conduct criminal, not (as I gather) because it was admitted to be necessary, but simply to strengthen the hands of the executive.

I can hardly doubt how the same case would have been dealt with in England.

Assuming the doing of the acts forbidden by proclamation of neutrality, although infractions of international law, not to be misdemeanors at common law, and not to be made offenses by muuicipal statute, the judges (I cannot doubt) would have said the act was yesterday legal or at least not illegal, and that municipal law not having declared it a crime they could not so declare it. According to the law of England a proclamation by the executive, in however solemn form, has no legislative force unless an act of Parliament has in fact so enacted as to orders of the Queen in counsel in many cases. But assuming the law to be as I have stated, it points to no failure in England to recognize the full obligation of international law as between states. For, notwithstanding isolated expressions of

opinion uttered in times of excitement, it will not to-day be doubted that it is the duty of states to give effect to the obligations of international law by municipal legislation where that is necessary, and to use reasonable efforts to secure the observance of that law.

In England we have an old constitution under which we are accustomed to fixed modes of legislation, and when at last we accept a new development of international law, we look to those methods to give effect to it. Indeed, that habit of looking to legislation to meet new deeds and developments, even in international concerns, a habit confirmed and strengthened in the current century, has done much to restrain the judges from that bold expansion of principle to meet new cases, which, when legislation was less active, marked judicial utterances.

On the other hand, with you things are materially different. Your constitution is still so modern that equally fixed habits of looking to legislation have had no time to grow up. Meanwhile that modern constitution is, from time to time, assailed by still more modern necessities, and the methods for its amendment are not swift or easy. The structure has become completely ossified. Hence has arisen what I may call a flexibility of interpretation, applied to the Constitution of the United States, for which I know no parallel in English judicature, and which seems to me to exceed the latitude of interpretation observed by your judges in relation to acts of Congress. I refer, as examples, to the emancipation of the slaves by President Lincoln during the civil war, which was justified as an act covered by the necessities of the case and within the "war power" conferred on the executive by the constitution; and also to the judicial declaration by the supreme court of the validity of the act of congress making greenbacks legal tender, on the ground that certain express powers as to currency, being vested in congress by the constitution, the power of giving forced circulation to paper flowed from them as a desirable, if not a necessary, implication. With us, no such difficulties arise. Our constitution is unwritten and the legislature is omnipotent. With you the constitution is written and the judicial power interprets it and may declare the highest act of congress null and void as unconstitutional. With us there can, in the strict sense of the words, be no such thing as an unconstitutional act of Parliament.

I turn now to the consideration of what charaterizes the later tendencies of international law. In a word, it is their greater humanity.

When Menelik, Emperor of Abyssinia, was recently reported to have cut off the right arms and feet of 500 prisoners, the civilized world felt a thrill of horror. Yet the time was, when to treat prisoners as slaves and permanently disable them from again bearing arms, were regarded as common incidents of belligerent capture. Such acts would once have excited no more indignation than did the inhumanities of the African slave trade before the days of Clarkson and Wilberforce.

Let us hope that it is no longer possible to do as Louis XIV did, in his devastation of the Palatinate, or to do as he threatened to do, break down the dykes and overwhelm with disaster the Low Countries. Let us hope, too, that no modern Napoleon would dare to decree as the first Napoleon did in his famous or infamous "seront brulees" edict of 1810. The force of public opinion is too strong and has reached a higher moral plane.

A bare recital of some of the important respects in which the evils of war have been mitigated by more humane customs must suffice.

Amongst them are: (1,) the greater immunity from attack of the persons and property of enemy-subjects in a hostile country; (2,) the restrictions imposed on the active operations of a belligerent when occupying an enemy's country; (3,) the recognized distinction between subjects of the enemy, combatant and non-combatant; (4,) the deference accorded to cartels, safe conducts and flags of truce; (5,) the protection secured for ambulances and hospitals and for all engaged in tending the sick and wounded—of which the Geneva Red Cross Convention of 1864 is a notable illustration; (6,) the condemnation of the use of instruments of warfare which cause needless suffering.

In this field of humane work the United States took a prominent part. When the civil war broke out President Lincoln was prompt in entrusting to Professor Franz Lieber the duty of preparing a manual of systematized rules for the conduct of forces in the field—rules aimed at the prevention of those scenes of cruelty and rapine which were formerly a disgrace to humanity. That manual has, I believe, been utilized by the government of England, France and Germany.

Even more important are the changes wrought in the position of neutrals in war times; who, while bound by strict obligations of neutrality, are in great measure left free and unrestricted in the pursuit of peaceful trade.

But in spite of all this who can say these times breathe the

spirit of peace? There is war in the air. Nations armed to the teeth prate of peace, but there is no sense of peace. One sovereign burthens the industry of his people to maintain military and naval armament at war strength, and his neighbor does the like and justifies it by the example of the other; and England, singular though she be, with her imperial interests scattered the world over, follows, or is forced to follow, in the wake. If there be now war, there is at best an armed peace.

Figures are appalling. I take those for 1895. In Austria the annual cost of army and navy was, in round figures, 18 millions sterling; in France, 37 millions; in Germany, 27 millions; in Great Britain, 36 millions; in Italy, 13 millions; and in Russia, 52 millions.

The significance of these figures is increased, if we compare them with those of former times. The normal cost of the armaments of war has of late years enormously increased. The annual interest on the public debt of the great powers is a war tax. Behind this array of facts stands a tragic figure. It tells a dismal tale. It speaks of over-burthen industries, of a waste of human energy unprofitably engaged, of the squandering of treasure which might have let light into many lives, of homes made desolate, and all this, too often, without recompense, in the thought that these sacrifices have been made for the love of country or to preserve national honor or for national safety. When will governments learn the lesson that wisdom and justice in policy are a stronger security than weight and armament?

"Ah! when shall all men's good,
Be each man's rule, and universal peace,
Lie, like a shaft of light, across the land."

It is no wonder that men—earnest men—enthusiasts if you like, impressed with the evils of war, have dreamt the dream that the millenium of peace might be reached by establishing a universal system of international arbitration.

The cry for peace is an old world cry. It has echoed through all the ages, and arbitration has long been regarded as the handmaiden of peace. Arbitration has, indeed, a venerable history of its own. According to Thucydides, the historian of the Peloponesian war, Archidamus, King of Sparta, declared that "it was unlawful to attack an enemy who offered to answer for his acts before a tribunal of arbiters."

The fifty years treaty of alliance between Argos and Lacedaemon

contained a clause to the effect that if any difference should arise between the contracting parties, they should have recourse to the arbitration of a neutral power, in accordance with the custom of their ancestors. These views of enlightening Paganism have been reinforced in Christian times. The Roman emperors for a time, and afterwards, in a fuller measure, the popes (as we have seen) by their arbitrament often preserved the peace of the old world and prevented the sacrifice of blood and treasure. But from time to time, and more fiercely when the influence of the head of Christendom lessened, the passions of men broke out, the lust for dominion asserted itself, and many parts of Europe became so many fields of Golgotha. In our own times the desire has spread and grown strong for peaceful methods for the settlement of international disputes. The reason lies on the surface. Men and nations are more enlightened. The grievous burden of military armament is sorely felt, and in these days when, broadly speaking, the people are enthroned, their views find free and forcible expression in a world-wide press. The movement has been taken up by societies of thoughtful and learned men in many places. The "Bureau international de la Paix" records the fact that some ninety-four Peace Associations exist, of which some forty are in Europe and fifty-four in America. Several congresses have been held in Europe to enforce the same object, and in 1873 there was established at Ghent the "Institute du Droit International," the declared objects of which are to put international law on a scientific footing, to discuss and clear up moot points, and to substitute a system of rules conformable to right for the blind chances of force and the lavish expenditure of human life.

In 1873 also the association for the Reform and Codification of the Laws of Nations was formed, and it is to-day pursuing active propaganda under the name of the International Law Association, which it adopted in 1894.

It has also published a report affirming the need of a system of international arbitration.

In 1888 a congress of Spanish and American jurists was held at Lisbon, at which it was resolved that it was indispensable that a tribunal of arbitration be constituted with a view to avoid the necessity of war between nations.

But more hopeful still—the movement has spread to legislative representative bodies. As far back as 1833, the senate of Massachussetts proclaimed the necessity for some peaceful means of

reconciling international differences, and affirmed the expediency of establishing a Court of Nations.

In 1890, the senate and house of representatives of the United States adopted a concurrent resolution, requesting the president to make use of any fit occasion to enter into negotiations with other governments, to the end that any difference or dispute, which could not be adjusted by diplomatic agency, might be referred to arbitration and peacefully adjusted by such means.

The British House of Commons, in 1893, responded, by passing, unanimously, a resolution expressive of the satisfaction it felt with the action of congress, and of the hope that the government of the Queen would lend its ready co-operation to give effect to it. President Cleveland officially communicated this resolution to congress, and expressed his gratification that the sentiments of the two great and kindred nations were thus authoritatively manifested in favor of the national and peaceable settlement of international quarrels by recourse to honorable arbitration. The parliaments of Denmark, Norway and Switzerland, and the French Chamber of Deputies have followed suit.

It seems eminently desirable that there should, be some agency by which members of the great representative and legislative bodies of the world interested in this far-reaching question, should meet on a common ground and discuss the basis for common action.

With this object there has recently been founded "The Permanent Parliamentary Committee in favor of Arbitration and Peace," or, as it is sometimes called, "The Inter-Parliamentary Union." This union has a permanent organization—its office is at Berne. Its members are not vain idealists. They are men of the world. They do not claim to be regenerators of mankind, nor do they promise the millenium, but they are doing honest and useful work in making straightner and less difficult, the path of intelligent progress. Their first formal meeting was held in Paris in 1889, under the presidency of the late M. Jules Simon; their second in 1890, in London, under the presidency of Lord Herschel, ex Lord Chancellor of Great Britain; their third in 1891, in Romè, under the presidency of Signor Bianchieri; their fourth 1892, at Berne, under the presidency of M. Droz; their fifth in 1894, at the Hague, under the presidency of M. Rohnsen; their sixth in 1895, at Brussels, under the presidency of M. Deschamps, and their seventh will, it is arranged, be held this year Buda-Pesth. Speaking in this place, I need only to refer, in passing, to the remarkable Pan-Amer-

ican congress held in your states in 1890, at the instance of the late Mr. Blaine, directed to the same peaceful object.

It is obvious, therefore, that the sentiment for peace and in favor of arbitration as the alternative of war, is growing apace. How has that sentiment told on the direct action of nations? How far have they shaped their policy according to its methods? The answers to these questions are also hopeful and encouraging.

Experience has shown that over a large area, international differences may honourably, practically and usefully be dealt with by peaceful arbitrament. There have been, since 1815, some sixty instances of effective international arbitration. To thirty-two of these the United States have been a party, and Great Britain to some twenty of them.

There are many instances, also, of the introduction of arbitration clauses into treaties. Here again the United States appear in the van. Amongst the first of such treaties—if not the very first, is the Guadaloupe-Hidalgo treaty of 1848, between the United States and Mexico. Since that date many other countries have followed this example. In the year 1873, Signor Mancini recommended that in all treaties to which Italy was a party, such a clause should be introduced. Since the treaty of Washington, such clauses have been constantly inserted in commercial, postal and consular conventions. They are to be found also in the delimination treaties of Portugal with Great Britain, and with the Congo Free State, made in 1891. In 1895, the Belgian senate in a single day approved of four treaties with similar clauses, namely, treaties concluded with Denmark, Greece, Norway and Sweden.

There remains to be mentioned a class of treaties in which the principle of arbitration has obtained a still wider acceptance. The treaties of 1888 between Switzerland and San Salvador, of 1888 between Switzerland and Ecuador, of 1888 between Switzerland and the French Republic, and of 1894 between Spain and Honduras, respectively contain an agreement to refer all questions in difference, without exception, to arbitration. Belgium has similar treaties with Venezuela, with the Orange Free State and the Hawaii.

These facts, dull as is the recital of them, are full of interest and hope for the future.

But are we thence to conclude that the millenium of peace has arrived—that the dove bearing the olive branch has returned to the ark, sure sign that the waters of international strife have permanently subsided?

I am not sanguine enough to lay this flattering unction to my soul. Unbridled ambition—thirst for wide dominion—pride of power still hold sway, although I believe with lessened force and in some sort under the restraint of the healthier opinion of the world.

But further, friend as I am of peace, I would yet affirm that there may be even greater calamities than war—the dishonor of a nation, the triumph of an unrighteous cause, the perpetuation of hopeless and debasing tyranny:

"War is honorable,
In those who do their native rights maintain;
In those whose swords an iron barrier are,
Between the lawless spoiler and the weak;
But is, in those who draw th' offensive blade
For added power or gain, sordid and despiceable."

It behooves then all who are friends of peace and advocates of arbitration to recognize the difficulties of the question, to examine and meet these difficulties, and to discriminate between these cases in which friendly arbitration is, and in which it may not be, practically, possible.

Pursuing this line of thought, the shortcomings of international law reveal themselves to us and demonstrate the grave difficulties of the position.

The analogy between arbitration as to matters in difference between nations, carries us but a short way.

In private litigation the agreement to refer is either enforceable as a rule of court, or, where this is not so, the award gives to the successful litigant a substantive cause of action. In either case there is behind the arbitrator the power of the judge to decree and the power of the executive to compel compliance with the behest of the arbitrator. There exist elaborate rules of court and provisions of the legislature governing the practice of arbitrations. In fine, such arbitration is a mode of litigation by consent, governed by law, starting from familiar rules, and carrying the full sanction of judicial decision. International arbitration has none of these characteristics. It is a cardinal principle of the law of nations that each sovereign power politically weak, is internationally equal to any other power, however politically strong. There are no rules of international law relating to arbitration, and of the law itself there is no authoritative exponent nor any recognized authority for its enforcement.

But there are differences to which, even as between individuals, arbitration is inapplicable—subjects which find their counterpart in

the affairs of nations. Men do not arbitrate where character is at stake, nor, will any self-respecting nation readily arbitrate on questions touching its national indepenence or affecting its honor.

Again, a nation may agree to arbitrate and then repudiate its agreement. Who is to coerce it? Or, having gone to arbitration and been worsted, it may decline to be bound by the award. Who is to compel it?

These considerations seem to me to justify two conclusions:— The first is that arbitration will not cover the whole field of international controversy, and the second that unless and until the great powers of the world, in league, bind themselves to coerce a recalcitrant member of the family of nations—we have still to face the more than possible disregard by powerful states of the obligations of good faith and justice. The scheme of such a combination has been advocated, but the signs of its accomplishment are absent. We have, as yet, no league of nations of the Amphictyonic type.

Are we are then to conclude that force is still the only power that rules the world? Must we then say that the sphere of arbitration is a narrow and contracted one?

By no means. The sanctions which restrain the wrongdoer—the breaker of public faith—the disturber of the peace of the world, are not weak, and year by year they wax stronger. They are the dread of war and the reprobation of mankind. Public opinion is a force which makes itself felt in every corner and cranny of the world, and is most powerful in the communities most civilized. In the public press and in the telegraph, it possesses agents by which its power is concentrated, and speedily brought to bear where there is any public wrong to be exposed or reprobated. It year by year gathers strength as general enlightenment extends its empire, and a higher moral altitude is attained by mankind. It has no ships of war upon the seas or armies in the field, and yet great potentates tremble before it and humbly bow to its rule.

Again, trade and travel are great pacifacators. The more nations know of one another, the more trade relations are established between them, the more good will and mutual interest grow up; and, these are powerful against working for peace.

But although I have indicated certain classes of questions on which sovereign powers may be unwilling to arbitrate, I am glad to think these are not the questions which most commonly lead to war. It is hardly too much to say that arbitration may fitly be applied in

the case of by far the largest number of questions which lead to international differences. Broadly stated, (1) wherever the right in dispute will be determined by the ascertainment of the true facts of the case; (2) where, the facts being ascertained, the rights depend on the application of the proper principles of international law to the given facts, and (3) where the dispute is one which may properly be adopted on a give-and-take principle, with due provision for equitable compensation, as in cases of delimitation of territory and the like—in such cases, the matter is one which ought to be arbitrated.

The question next arises, what ought to be the constitution of the tribunal of arbitration? Is it to be a tribunal ad hoe, or is it to be a permanent international tribunal?

It may be enough to say that at this stage, the question of the constitution of a permanent tribunal is not ripe for practical discussion, nor will it be until a majority of the great powers have given in their adhersion to the principle. But what ever may be said for vesting the authority in such powers to select the arbitrators, from time to time, as occasion may arise, I doubt whether in any case a permanent tribunal, the members of which shall be a priori designated, is practicable or desirable. In the first place, what, in the particular case, is the best tribunal, must largely depend upon the question to be arbitrated. But, apart from this, I gravely doubt the wisdom of giving that character of permanence to the personnel of any such tribunal. The interests involved are commonly so enormous and the forces of national sympathy, pride and prejudice are so searching, so great and so subtle, that I doubt whether a tribunal, the membership of which had a character of permanence, even if solely composed of men accustomed to exercise the judicial faculty, would long retain general confidence, and, I fear it might gradually assume intolerable pretentions.

There is danger, too, to be guarded against from another quarter. So long as war retains the sole court wherein to try international quarrels, the risks of failure are so tremendous, and the mere rumor of war so paralyzes commercial and industral life that pretentions wholly unfounded will rarely be advanced by any nation and the strenuous efforts of statesmen, whether immediately concerned or not, will be directed to prevent war. But if there be a standing court of nations to which any power may resort, with little cost and no risk, the temptation may be strong to put forward pretentions and unfounded claims, in support of which there may

readily be found in most countries (can we except even Great Britain and the United States?) busybody Jingoes only too ready to air their spurious and inflammatory patriotism.

There is one influence which by the law of nations may be legitimately exercised by the powers in the interest of peace—I mean meditation.

The plenipotentiaries assembled at the congress of Paris in 1856, recorded the following admirable sentiments in their twenty-third protocol: "The plenipotentiaries do not hesitate to express, in the names of their governments, the wish that the states between which any serious misunderstanding may arise should, before appealing to arms, have resource as far as circumstances may allow to the good offices of a friendly power. The plenipotentiaries hope that the governments not represented at the congress will unite in the sentiment which has inspired the wish recorded in the present protocol."

In the treaty which they concluded they embodied, but with a more limited application, the principle of mediation, more formal than that of good offices, though substantially similar to it. In case of a misunderstanding between the porte and any of the signatory powers, the obligation was undertaken "before having recourse to the use of force, to afford the other contracting parties the opportunity of preventing such an extremity by means of their mediation." (Art. 8.) Under this act Turkey, in 1877, appealed to the other powers to mediate between her and Russia. It is not perhaps, to be wondered at, considering the circumstances, that the appeal did not succeed in preventing the Russo-Turkish war. But the powers assembled in the African conference at Berlin were not discouraged from repeating the praiseworthy attempt, and in the final act of that conference the following proviso (article 12) appears:

"In case of a serious disageement arising between the signatory powers on any subjects within the limits of the territory mentioned in article one and placed under the regime of commercial freedom, the powers mutually agree, before appealing to arms, to have recourse to mediation of one or more of the neutral powers."

It is to be noted this provision contemplates not arbitration but mediation, which is a different thing. The mediator is not, at least, in the first instance, invested, and does not seek to be invested, with authority to adjudicate upon the matters in difference. He is the friend of both parties. He seeks to bring them together. He is careful to avoid, as to each of them, anything which may

wound their political dignity of their susceptibilities. If he cannot compose the quarrel, he may at least narrow its area and probably reduce it to more limited dimensions, the result of mutual concessions; and, having narrowed the issues, he may pave the way for a final settlement by a reference to arbitration or by some other method.

This is a power often used, perhaps not so often as it ought to be—and with good results.

It is obvious that it requires tact and judgment, as to mode, time and circumstance, and that the task can be undertaken hopefully, only where the mediator possesses great moral influence, and, where he is beyond the suspicion of any motive except desire for peace and the public good.

There is, perhaps, no class of questions in which mediation may not, time and occasion being wisely chosen, be usefully employed, even in delicate questions affecting national honor and sentiment.

Mr. President, I come to an end. I have but touched the fringe of a great subject. No one can doubt that souud and well defined rules of international law conduce to the progress of civilization and help to insure the peace of the world.

In dealing with the subject of arbitration I have thought it right to sound a note of caution, but it would, indeed, be a reproach to our nineteen centuries of christian civilization, if there were now no better method for settling international differences than the cruel and debasing methods of war. May we not hope that the people of these states and the people of the mother land—kindred peoples—may, in this matter, set an example of lasting influence to the world? They are blood relations. They are indeed separate and independent peoples, but neither regards the other as a foreign nation.

We boast of our advance and often look back with pitying contempt on the ways and manners of generations gone by. Are we ourselves without reproach? Has our civilization borne the true marks? Must it not be said, as has been said of religion itself, that countless crimes have been committed in its name? Probably it was inevitable that the weaker races should, in the end, succumb, but have we always treated them with consideration and with justice? Has not civilization too often been presented to them at the point of the bayonet and the Bible by the hands of the fillibuster? And apart from races we deem barbarous, is not the passion for dominion and wealth and power accountable for the worst chapters

of cruelty and oppression written in the world's history? Few peoples—perhaps none—are free from this reproach. What, indeed, is true civilization? By its fruit you shall know it. It is not dominion, wealth, material luxury; nay, not even a great literature and education wide spread—good though these things be. Civilization is not a veneer; it must penetrate to the very heart and core of societies of men.

Its true signs are thought for the poor and suffering, chivalorus regard and respect for women, the frank recognition of human brotherhood, irrespective of race or color or nation or religion, the narrowing of the domain of mere force as a governing factor in the world, the love of ordered freedom, abhorrence of what is mean and cruel and vile, ceaseless devotion to the claims of justice. Civilization in that, its true, its highest sense, must make for peace. We have solid grounds for faith in the future. Government is becoming more and more, but in no narrow class sense, government of the people by the people and for the people. Populations are no longer moved and maneuvered as the arbitrary will or restless ambition or caprice of kings and potentates may dictate. And although democracy is subject to violent gusts of passion and prejudice, they are gusts only. The abiding sentiment of the masses is for peace—for peace to live industrious lives and to be at rest with all mankind. With the prophet of old they feel—though the feeling may find no articulate utterance—"how beautiful upon the mountains are the feet of him that bringeth good tidings that publisheth peace."

Mr. President, I beg by speaking of the two great divisions—American and British—of that English speaking world which you and I represent to-day, and with one more reference to them I end.

Who can doubt the influence they possess for ensuring the healthy progress and the peace of mankind. But if this influence is to be fully felt, they must work together in cordial friendship, each people in its own sphere of action. If they have great power, they also have great responsibility. No cause they espouse can fail; no cause they oppose can triumph. The future is, in large part, theirs. They have the making of history in the times that are to come. The greatest calamity that could befall would be strife which would divide them.

Let us pray that this shall never be. Let us pray that they, always self-respecting, each in honor upholding its own flag, safeguarding its own heritage of right and respecting the rights of others, each in its own way fulfilling its high national destiny, shall yet work in harmony for the progress and the peace of the world.

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NOTES.

The address of Lord Russell before the American Bar Association, although longer than the articles which we are in the habit of printing in this paper, has been commented on so much and by many people praised so highly, that it was thought best to publish it in full. It has consequently taken the place for the month of usual contributed short articles.

In the Supreme Court of the United States was decided lately the case of *Plessy* v. *Ferguson*. In this case the question at issue was whether or not an act was constitutional which directed separate coaches and accommodations to be provided on railway trains for white people and colored people and which made a passenger liable to fine or imprisonment who insisted on occupying a coach or compartment other than the one set apart for his race. The act has been held constitutional and not contrary to the Constitution Amendment 14. The opinion is by Justice Brown and a distinction is made between laws interfering with the political equality of the two races and those requiring their separation in schools, theatres, etc. The opinion shows that acts under the second class have been in many cases held constitutional.

Since our last issue, a man, eminent as a lawyer and as a man of affairs has passed away. James F. Joy is dead. He was a man who more, perhaps, than any other, contributed to the advancement

of the state of Michigan and this whole section of the country. His life has been long, busy and successful. Until within a very short time he could be seen on the streets and about his home erect and strong, doing well as a man of over eighty, the work of one in his prime.

His death will be felt by individuals of all classes of society. The Detroit Bar Association in its meeting, called as a mark of respect to the memory of one so notable, was more largely attended than that of any similar meeting held in years; the speakers were more eminent; the feeling of loss more apparent, and the testimonials to the worth, honesty and uprightness of the deceased were more sincerely spoken, than is usual at such times.

His work is done and well done, but his loss is made the harder to bear on that account. A sketch of the life of James F. Joy, written by Mr. Fred. Carlisle, and which appeared a few months ago in the MICHIGAN LAW JOURNAL, gives some of the reasons for the influence and success of Mr. Joy's life. With deep regret we mourn another great man dead.

BOOK REVIEWS.

HAND BOOK ON THE LAWS OF REAL PROPERTY—By EARL P. HOPKINS, A. B., LL. M.—Author of Problems and Quiz on Criminal Law, Contracts, Criminal Procedure, Constitutional Law, etc. St. Paul, Minn.: West Publishing Co. 643 pp. Price, $3.75.

The mechanical construction of the book is very good, as to print, paper and binding, and its size is such that it can be easily handled in office work. The literary construction is also of the approved modern style. The branch or topic of rea-lestate law, is technically set forth in small capital letters, the definitions and concise statements of the points of law discussed, is set forth by the black letter type, and the more minute subdivisions are displayed in italic type and all are separated by well defined paragraphs. The text is sustained by the best and most recent decisions, which are marked by figures, referring to decisions cited on the margin. Like the most of modern text books, it is written in the style of a brief, and well adapted to the use of a working practitioner in drawing pleadings and briefs. The index, is full and opens the entire volume to the glance of the workman. This is of great advantage, because many well written books are comparatively useless for want of a proper and comprehensive index.

The plan of the volume is to set forth the meaning of the common law, couched in modern legal language. In most instances, the author has made a correct statement of the ancient real-estate law, but has been successful in condensing it into a small space.

The peculiar value of the book, seems to be, in the manner of showing to what extent the real-estate common law has been modified by the state statutes, and in pointing out in detail, the changes made by each state law, thus aiding the local practitioner in applying the old law to his local necessities.

The author has also pointed and clearly illustrated much modern real-estate not known to the common law. Modern civilization has needs not known in olden times, and real-estate is used and controlled to suit the circumstances. These changes are brought out, sometimes clearly, and in other instances, they are only hinted. Of course the size of the treatise, makes it necessary to omit much that would be useful, in a more complete work.

Whereever the modern development of law has been set forth, the points discussed by the author, are well sustained and explained by many of the later authorities and decisions.

RECENT MICHIGAN DECISIONS.

BUILDING CONTRACT—DECISION OF ARCHITECT—FRAUD.—Where a contract for the erection of a building contained a clause, "that if any discrepancy shall be found to exist between the plans, working drawings and specifications, the decision as to the fair construction, and of the true intent and meaning of the plans, working drawings and specifications shall be made by said architects, whose decision shall be binding in that regard, upon the parties hereto," the decision of such architects as to an allowance for extra work done under the contract is final and binding.

2. The fact that the architects drew the plans and specifications and were to receive as their compensation, five per cent of the total cost of the building, would not warrant an inference of fraud in their decision. *Kelly* v. *Public Schools of Muskegon.* July 31, 1896.

COMMERCIAL PAPER OF CORPORATION—NEGOTIABILITY—CORPORATE SEAL.—The commercial paper of a corporation negotiable in its form does not lose the quality of negotiability by having attached thereto the corporate seal.

The indorser of a prommissory note can not avail himself of his agent's mistake and the bad faith of the payee in the transaction inducing its delivery to defeat the note in the hands of a bona fide holder. *Chase National Bank* v. *Faurot.* (May 26).

DEFECTIVE WALK—DECLARATION—EVIDENCE—DAMAGES.—All technical defects in a declaration to recover damages for injuries received by reason of a defective walk will be treated as waived by the filing of a plea of the general issue.

An allegation in a declaration to recover for personal injuries which set forth that the plaintiff, by reason of a defective walk, "then and there received certain wounds, bruises and contusions, and certain internal injuries, whereby he became immediately so sick, lame and disordered as to be unable to help himself, and was so greatly injured that it then and there became necessary for him to be carried to his house; and that said plaintiff, as the immediate result of said injuries continued to be so sick and ill that within a short time thereafter, towit. in one week, he died," is sufficiently specific to admit testimony as to the extent and nature of the injuries received by plaintiff, and their effect upon him.

3. The question as to whether or not the walk in question had been repaired by the city just prior to the time of the accident and that sufficient time had not elapsed after that and before the accident, to charge the city with negligence, having been fairly and fully presented to the jury, who found against the city, the error, if any, in admitting a resolution passed some months prior to the accident, instructing the city marshall to put this walk in repair, was cured.

4. Testimony of a witness, as to the present worth of the services of the plaintiff based upon his expectation of life, the calculation being based upon the plaintiff's ability to earn a certain sum per year, was competent, the testimony being admitted as suggesting methods of computing the damages in case the jury found for the plaintiff. *Storrs* v. *City of Grand Rapids.* July 31, 1896.

DEFECTIVE WALK—PERSONAL INJURIES—EVIDENCE—NOTICE OF DEFECT.—In action to recover for personal injuries sustained by reason of an alleged defective walk plaintiff, after giving her testimony in chief, testified upon cross-examination, that soon after her injury she went to work in the factory where she was employed; subsequently she was allowed to testify that her reason for going to work was due to her poverty.

Held:—That the admission of the testimony was not error.

II. In an action for personal injuries, complaints of present pain and suffering are admissible.

III. In an action for personal injuries, caused by an alleged defective walk, it was error for the court to neglect to instruct the jury that recovery could not be had unless it be shown that the village had received notice of the defective condition of the walk prior to the injury, and that it had neglected for a reasonable time after the injury to put the same in repair. *Burleson* v. *Village of Reading*. July 31, 1896.

EJECTMENT—ADVERSE POSSESSION—EVIDENCE—INSTRUCTION TO JURY.—Action of ejectment brought for a strip of land on the boundary line between lot five, owned by the plaintiff, and lot six, owned by the defendant. Plaintiff claimed the land in question by adverse possession under color of title. The questions raised were purely questions of fact.

Held: That the admission by the court of evidence relative to surveys and surveyor's lines of the lots of plaintiff and defendant, and as to the original width of the lots, was not error.

2. It was not error to admit evidence of defendant as to the use he made of plaintiff's lot in passing from the front to the rear of his own lot.

3. The instruction to the jury on the question of adverse possession was correctly given. *Beecher* v. *Ferris*. July 31, 1896.

JUSTICE OF THE PEACE—NEGLIGENCE—FAILURE TO ENTER JUDGMENT.—A Justice of the Peace is liable for damages caused by his negligence to a party litigant in his court. *Larson* v. *Kelly*.

PURCHASE BY CREDITOR FROM DEBTOR—FRAUD—EVIDENCE.—1. Where a purchase is made by a creditor from a debtor in failing circumstance, knowledge of a purpose to defeat creditors is not necessarily sufficient to avoid the transaction if the indebtedness is honest, and no more property is taken than is sufficient to satisfy such indebtedness.

2. A sale of property, by which the whole or part of the purchase price finds its way into the hands of a failing debtor, and if made with the intent to defraud creditors, and with knowledge in the purchaser that such is the intent, is none the less fraudulent, and the purchaser is none the less liable as a participator in the fraud, because there was included in the transaction a cancellation of an indebtedness owing to him.

3. When there is evidence tending to show that a fraud has been committed it is the duty of the court to pass upon the same.

4. Where it appears that in the settlement between the parties there was an indebtedness due owing to a mistake of fact and that the indebtedness was not included in the general settlement, a recovery will be allowed for the same. *Gumberg* v. *Treusch*. July 31, 1896.

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THE INCOME TAX.

ROBERT T. SPEED.

The supreme court of the United States has been severely criticised for its decision in the income tax case. The opinion is quite prevalent, especially among the Populist element, that the court was in error in holding the income tax unconstitutional.

The criticism to which this court was subjected by some of the speakers at the Democrat-Populist convention, and afterwards embodied in the platform adopted by that convention, are now fresh in the mind, and need not be repeated here. The presidential nominee of that convention declared that the income tax was constitutional and that the court was in error in holding to the contrary. The legality, wisdom and policy of this tax has been agitated for some time, and I apprehend that an income tax bill in some form or other will be introduced in the next congress.

The court was nearly equally divided in opinion as to the legality of the tax, there having been five opinions delivered in the case. The majority held that the tax was void. The court having been so divided, I consider it to be still an open question, and therefore it would not be amiss to discuss it.

The question regarding the validity of the income tax arose in this way:

A bill was filed by Charles Pollock, a citizen of the state of Massachusetts, on behalf of himself and all the stockholders of the defendant company, against the Farmers' Loan & Trust Company, a corporation of the state of New York, to restrain said company

from paying an income of two per cent. as provided by the income tax law on about $200,000.00 of income which the company received annually.

"The bill charged that the provisions in respect of the said alleged income tax were unconstitutional, null and void, in that the tax was a direct tax in respect of the real estate held and owned by the company in its own right and in its fiduciary capacity, by being imposed upon the rents, issues, and profits of said real estate, and was likewise a direct tax in respect of its personal property and the personal property held by it, for others for whom it acted, for others in its fiduciary capacity, which direct taxes were not in and by said act apportioned among the several states as required by section 2 of article 1, of the constitution; and that if the income tax so incorporated in the act of congress were held not to be a direct tax, nevertheless its provisions were unconstitutional, null and void in that they were not uniform throughout the United States as required by section 8 of article 1 of the constitution." Further objections were set forth in the bill, but those I have mentioned are the important ones, and the others need not be stated.

By section 27 of the act of August 28th, 1894, known as the Wilson Tariff Act, and entitled "An Act to reduce taxation, to provide revenue for the government, and for other purposes," it was provided "That from and after the first day of January, 1895, and until the first day of January, 1900, there shall be assessed, levied and collected, and paid annually upon the gains, profits, and income received in the preceding calendar year by every citizen of the United States, whether residing at home or abroad, and every person residing therein, whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation, carried on in the United States or elsewhere, or from any other source whatever, a tax of two per centum on the amount so derived over and above four thousand dollars, and a like tax shall be levied, collected, and paid annually upon the gains, profits, and income from all property owned, and of every business, trade, or profession carried on in the United States by persons residing without the United States."

Section 28 declares what shall be included and what excluded in estimating the gains, profits, and income of any person.

Section 29 provides for making a return of all taxable property of more than three thousand five hundred dollars.

By section 30, the taxes or incomes are made payable on or

before July 1st, of each year, and five per cent. penalty levied on taxes unpaid, and interest.

The remaining sections are immaterial to a consideration of this question.

The contention of the complainant is, that the law in question imposing a tax on the income or rents of real estate, imposes a tax on the real estate itself; and in imposing a tax on the interest or other income of bonds or other personal property held for the purposes of income or ordinarily yielding income, imposes a tax upon the personal property itself; that such tax is a direct tax, and void because imposed without regard to the rule of apportionment; and that by reason thereof that the whole law is void.

The case hinges upon the question as to whether or not the income tax is a direct or an indirect tax. If it be the former, then the bill filed by Mr. Pollock ought to be sustained, if the latter, then it should be dismissed.

Section 2, article 1, of the constitution provides that "Representatives and direct taxes shall be apportioned among the several states which may be included within this Union according to their respective members."

There are five kinds of taxes, viz: Duties, imposts, excises, capitation, taxes and direct taxes on land.

The three first named are required to be uniform. Constitution art. 1, sec. 8. The two last named are laid by the rule of apportionment as required by the clause of the constitution just quoted.

The power given in the constitution to congress to tax is limited only in two ways: 1st—Direct taxes must be laid by the rule of apportionment. 2nd—Indirect taxes by the rule of uniformity. 3rd—It cannot tax exports. License tax cases, 5 Wall., p. 462.

The power of the congress to levy taxes is co-extensive with the territory of the United States.

Loughborough v. *Blake, 5 Wheat., p. 317.*

There can be no doubt this income tax law is invalid as regards the tax upon real estate and the income derived therefrom for the reason that the tax was not apportioned according to the mandate of the constitution. It appears that the company owns in its own right real estate which brings in an income from rents of $50,000. a year. It holds one hundred parcels of real property for minors and other beneficiaries of the value of over $5,000,000., and collects as trustee annually, rents exceeding $200,000.

The provisions of the act of 1894 impose a tax of two per cent.

upon the gains, profits, and income derived from any kind of real property, including rent and the growth and produce of lands and profits made upon the sale of land if purchased within two years. The rate of taxation upon corporations and associations is in excess of the rate imposed upon individuals and associations. Persons having incomes of $4,000, or under pay nothing; corporations having like incomes pay two per cent. Persons having incomes of over $4000. pay on the excess. Corporations having like incomes derived from like property and like values, pay two per cent. upon the entire amount. Partnerships are exempted from the operations of the act.

"Any individual owning lands, the rents of which net $8000., pays $80. or two per cent. upon the excess over $4000. A corporation or association having like property pays a tax of two per cent. upon the whole $8000. or $160. double the tax upon the individual. Five individuals as partners own property or carry on business netting them after paying all taxes and expenses, $20,000, which they divide equally. The partnership is entirely exempted from taxation, and each member is exempted. If those same five individuals organized a private trading corporation or association under the laws of one of the states, and held the property in that form, they would have to pay an income tax of $400., simply and solely because they had united their interest in a corporate or associate form instead of a partnership."

Thus it will be seen that the law discriminates between corporations, associations, partnerships and persons. The constitution says that direct taxes shall be apportioned, and every case from the very early case of *Hylton* v. *United States*, have held that a tax on land was a direct tax.

In *Hylton* v. *United States*, Mr. Justice Chase says that the direct taxes contemplated by the constitution are a capitation or poll tax and a tax on land.

Mr. Justice Patterson says that a tax on land is deemed to be a direct tax, and Mr. Justice Iredell says that a land or poll tax may be considered a direct tax. This case was followed by *Pacific Insurance Company* v. *Soule, 7 Wall., p. 433; Veazie Bank* v. *Fenno, 8 Wall., p. 533; Springer* v *United States, 102 U. W., 586.* Without referring specially to the numerous cases which lay down the same rule, I will say that Mr. Justice Field states that a tax on land has by universal consent been recognized as a direct tax.

Now if a tax on land is a direct tax, is not a tax on the income

derived from land, whether cultivated or uncultivated, a direct tax?

Hamilton, secretary of the treasury, speaking of the subject asks: "What, in fact, is property but a fiction, without the beneficial use of it? In many cases, indeed, the income or annuity is the property itself." In Jarman on Wills, vol. 1, page 740, it is said: "A devise of the rents and profits or of the income of land passes the land itself both at law and in equity: a rule, it is said, founded on the feudal law, according to which, the whole beneficial interest in the land consisted in the right to take the rents and profits. And since the act IV. c. 26, such a devise carried the fee simple."

Coke upon Littleton says: "If a man seized of lands in fee by his deed granted to another, the profit of those lands, to have and to hold to him and his heirs, and maketh *livery secundum forman chartae*, the whole land itself, doth pass, for what is the land but the profits thereof." In *Doe d. Goldin* v. *Lakeman* decided by the court of Kings Bench, that "It is an established rule that a devise of the rents and profits is a devise of the land itself."

In *Patterson* v. *Ellis*, *11 Wend. 259*, it was held that "a devise of the interest or of the rents and profits is a devise of the thing itself, out of which that interest or those rents and profits may issue."

In *Reed* v. *Reed*, *9 Mass.*, *372*, it was said "a devise of the income of lands is the same in its effect, as a devise of the lands."

In *Anderson* v. *Greble*, *1 Ashmead* (*Penn.*), *136*, King, the president of the court said: I take it to be a well settled rule of law, that by a devise of the rents, profits, and income of land, the land itself passes."

An indefinite number of cases to the same effect might be cited. Thus it will be seen that whatever effects the value of land effects the land itself. If, as Hamilton says, the income or annuity is the property itself," then it follows that if a tax on land is direct, a tax on the income of land is direct, for the two are inseparable; they are identically the same.

What is a direct or indirect tax? I will answer this question by referring to the definition given by Mr. Edmunds during the argument of the income tax cases.

Mr. Justice Harlan:—Have you formulated in your own mind any general rule by which we are to determine whether a tax is direct or indirect?

Mr. Edmunds:—I have. I am perfectly ready to state it. But like most general rules, it requires exceptions, as all judicial courts know and all people acquainted with affairs know. It is almost

impossible to state a general rule which will not have its exceptions, and its qualifications, and its variations.

But my definition is—and I believe it to be generally found to be universally true—that a direct tax is a tax upon every kind of property and upon every kind of person in respect of himself, or in respect of his property, either in existence or acquired, or to be acquired, and not in respect to his voluntary calling, pursuit or acts as importing goods which he may import or not import as he pleases, not in respect of his being a trader or manufacturer, etc., in all of which cases he is taxed as a consequence of his free choice of business and in all of which the burden is to some degree moved on—but in respect to things that belong to the existence of property as an equity—a state of physical being.

Duties, imposts, and excises are, in a large degree, and almost universally, heavy or light upon each person, depending upon his own will. If we say, as some writers do, that indirect taxes are those upon consumption, I repeat again what I believe I said before to some extent, that taxes upon consumption are not taxes which bear unequally upon the so-called poor and the so-called rich, because we all know—it is an everyday experience—that there are people in this very town and probably in this very room—I know there are—who live respectable and comfortable upon half that which it costs some who are their neighbors.

Mr. Justice Brown:—Is not the definition somewhat like this: That direct taxes are paid by the taxpayer both immediately and ultimately; while indirect taxes are paid immediately by the taxpayer and ultimately by somebody else.

Mr. Edmunds:—Yes, sir; that is a much clearer definition than I have given, though I think the whole burden rarely falls on the last man. It is, I think, borne partly by each agent in the movement. The income of a man is inseparable from him. It is as inseparable from a man as his character is, or his name. It is there. It is personal. It begins and ends with him. It was for that reason that I read the definitions in existence at the time this constitution was made—as a capitation tax included an income tax. It is an inseparable quality, idea, entity that could not be grasped by the human mind otherwise than in connection with the person. It may be that it should not have been so. Perhaps our patriotic friends who have left us would have made it some other way. But our mission is to find out what it was, and not what it ought to have been. Personally, I think that if you were to impose an income tax

upon the gains of all property as property according to valuation all over the United States, according to their population, it would come much nearer being uniform, man for man, throughout the United States, than a great many politicians and philosophers suppose.

It seems that the tax upon the real estate of the defendant company and the rents derived from such real estate should be declared void. So much for the tax upon real estate.

Now let us consider the tax assessed against the personal property of the defendant company. Should a tax on personal property be held to be a direct tax? How in principle does the corpus of personal property differ from a piece of real estate? I own a house to-day and sell it to-morrow, and take as its consideration a mortgage on the same property for $10,000, the value of the house. Is a tax upon the house one kind of a tax, and a tax on the proceeds of the house another? It cannot be: it is impossible. There is no real or substantial difference between a tax on personal and a tax on real property. No such thing has ever been decided; no such thing has ever been hinted at. A tax on personality has all the elements of a direct tax, exactly as a tax on real estate.

It is directly imposed; it is presently paid; it is ultimately borne by the party owning it. There is no choice for him to escape from the tax but to run away. There is no volition about it, as there is in the case of any consumable commodity upon which excises are laid. Suppose a direct tax be levied upon real and personal property in the states, could a man whose personal property was touched by it appeal to the court with any hope of success and say: "That tax on my personal property is not a direct tax, but is an excise or a duty or impost. I will pay on my personal property, but I shall not pay, and I shall appeal to the supreme court to free me from paying the portion of the tax that rests upon my personal property. The court certainly would overrule such a contention. I think you will have no difficulty in coming to the conclusion that the corpus of personal property is included within the subject of a direct tax, and that a tax thereon must be apportioned." (Extract from argument of Mr. Rufus Choate in Pollock v. Farmers' Loan and Trust Company).

Suppose I mortgage the rents of my lands (and this may be done, *Van Rensselaer* v. *Dennison*, *35 N. Y. 393*) and the mortgage be taxed, could I escape the tax on the ground that it was an excise or duty? Certainly the court would hold that it was a tax on the land itself. I have already shown that there is no difference between

land and the profit therefrom, and if a tax on the rents of land is the same as a tax on the land itself, then a tax on the mortgage of rents would be the same thing as a tax on the land. It is a real estate mortgage in both cases. A tax on personal property (this mortgage) ought to fall within the categore of direct taxes. How is there any escape from this?

Cooley (On Taxation p. 6) classes taxes as follows:—Direct, under which designation would be included those which are assessed upon the property, person, business, income, etc., of those who are to pay them; and indirect, or those which are levied on commodities before they reach the consumer, and are paid by those upon whom they ultimately fall, not as taxes, but as a part of the market price of the commodity. Under the second head may be classed the duties upon imports, and the excise and stamp duties levied upon manufacturers. It will be seen that income is classed with direct taxes.

It has been popularly supposed and even charged (I refer to the Chicago Platform) that the supreme court had disregarded its former divisions in regard to taxes on personal property, or rather taxes on income; but we will find upon an examination of the authorities that in no instance has a tax on personal property been held to be indirect.

The first case in which the question as to what was a direct tax and what an indirect tax, arose in the case of *Hylton* v. *The United States, 3 Dallas, p. 171.* The question there, was, whether a tax on carriages was direct or indirect. The court held that the tax was indirect. It might be supposed that this tax having been sustained as indirect, that a tax on personal property is indirect, but such is not the case. The court directly avoided expressing any opinion upon that point. Mr. Justice Patterson says "Whether direct taxes, in the sense of the constitution, comprehend any other tax than a capitation tax, and a tax on land, is a questionable point." Mr. Justice Iredell said: "there is no necessity, or propriety, in determining what is or is not, a direct, or indirect tax, in all cases. Some difficulties may occur which we do not at present forsee. Perhaps a direct tax, in the sense of the constitution, can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances. A land or a poll tax may be considered of this description. * * * * In regard to other articles there may be considerable doubt.

Mr. Justice Chase said that he was inclined to think, but of this

he did not give a judicial opinion, that "the direct taxes contemplated by the constitution, are only two, to wit: a capitation, or poll tax, simply, without regard to property, profession or any other circumstance, and a tax on land;" and that he doubted "whether a tax, by a general assessment of personal property, within the United States, is included within the term "direct tax." But he thought that "an annual tax on carriages for the conveyance of persons, may be considered as within the power granted to congress to lay duties. The term duty, is the most comprehensive next to the generical term tax; and practically in Great Britain, (whence we take our general idea of taxes, duties, imposts, excises, customs, etc.), embraces taxes on stamps, tolls for passage, etc., and is not confined to taxes on importation only.

It seems to me that a tax on expense is an indirect tax; and I think an annual tax on carriages for the conveyance of persons is of that kind; because a carriage is a consumable commodity; and such annual tax on it, is on the expense of the owner. It will be seen that the court, while suggesting doubt whether anything but a capitation or a land tax was a direct tax within the meaning of the constitution, directly avoided expressing an opinion upon that question, or laying down any comprehensive definition; but confined itself to the question directly before it. The point decided in this case does not effect the question at issue here.

Now, if, as Mr. Justice Chase says, an annual tax on carriages for the conveyance of persons is a tax on expense, and that the exponse is on the owner, then the tax was properly held to be indirect, because the tax-payer could charge the tax all over to the passengers, by making a slight addition to their fares. He could have shifted the entire burden upon the passengers.

Chief Justice Fuller says: "Ordinarily, all taxes paid primarily by persons who can shift the burden upon someone else, or who are under no legal compulsion to pay them, are considered indirect taxes."

And Mr. Justice Field says: "Direct taxes in a general and large sense, may be described as taxes derived immediately from the person, or from real or personal property, without any recourse therefrom to other sources for reimbursement." Here the tax-payer would have recourse to his passengers.

A case which, I think, has been relied upon more than any other to show that personal property was a proper subject for an indirect tax, is the case of *Pacific Insurance Company* v. *Soule*, *7 Wall.*,

p. 433.

In this case a tax was laid upon the amounts insured, renewed, or continued by insurance companies; upon the gross amount of premiums received and assessments by them; and a tax also upon dividends, undistributed sums, and income. It has been contended that "the tax was levied on the income of insurance companies as a unit, including every possible source of revenue, whether from personal or real property, from business gains or otherwise." And such is true. But the tax was levied under the old income tax law, which taxed the business of certain selected classes of corporations, such as banks, savings institutions, insurance companies, and railroads.

The tax upon classes of corporations, under this old income tax law was sustained, not because it was a tax upon the property of corporations, but upon the ground that it was an excise upon their business.

Under Section 122 of the Internal Revenue Law, it was enacted that: "Any railroad, canal, turnpike, canal-navigation, or slack-water company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip, or money due or payable to its stock-holders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a tax of five per centum on the amount of all such interest or coupons, dividends or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens; and said companies are hereby authorized to deduct and withhold from all payments on account of any interest, or coupons, and dividends due and payable, as aforesaid, the tax of five per centum; and the payment of the amount of said tax so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend or interest, or coupon on the bonds, or other evidence of their indebtedness so held by any person or party whatever, except where said companies have contracted otherwise."

It was held in *Railroad Company* v. *Collector, 100 U. S., p. 595,*

that this tax was an excise upon the business of the class of corporations named in the act.

In *Society for Savings* v. *Coite, 6 Wall., 594*, it was held that the statute of a state requiring savings societies, authorized to receive deposits, but without authority to issue bills, and having no capital stock, to pay annually into the state treasury a sum equal to three-fourths of one per cent. on the total amount of their deposits, imposed a franchise tax, and not a tax on property.

In *Provident Institution* v. *Massachussetts, 6 Id., 611*, a tax on the amount of deposits held by complainants was assessed, and it was held the case was ruled by *Society for Savings* v. *Coite*.

It was a tax on the franchise and not a tax on property.

In *Veazie Bank* v. *Fenno, 8 Wall., p. 533*, a tax was laid on the circulation of state banks, or national banks paying out the notes of individuals or state banks. The section imposing this tax was as follows: "That every national banking association, state bank, or state banking association, shall pay a tax of ten per centum on the amount of notes of any person, state bank, or state banking association, used for circulation and paid out by the after them first day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the commissioner of internal revenue."

It was held that the tax was not a tax upon property or income, but upon the act of issuing notes; not for the obligation itself, but upon its use in a particular way.

The case of *Springer* v. *United States, 102 U. S., p. 586*, has been urged as holding that a tax on incomes was indirect. That was an action of ejectment brought on a tax deed issued to the United States on sale of defendant's real estate for income taxes. The defendant contended that the deed was void because the tax was direct tax, not levied in accordance with the constitution. The statement of the case in the report shows that Springer returned a certain amount of his net income for the particular year, but does not give the details of what his income, gains, and profits consisted in. The original record discloses that the income was not derived in any degree from real estate, but was in part professional as attorney-at-law, and the rest interest on United States bonds.

It appears from the decision that the court did not distinguish between the latter and the former source of income.

It will be seen that the court has never held that a tax on personal property was indirect; and from what has been said before as

to what constituted a direct tax, it seems that personal property should be included under that head.

The income tax case, as reported, covers two hundred and twenty-seven pages; the opinions delivered are very lengthy, covering about one hundred and fifty pages.

In the brief space which I have been alloted, it has been impossible to do justice to the great constitutional question involved, and a great deal which would be material to this question has necessarily been left unsaid.

NOTEWORTHY CHANGES IN STATUTE LAW.*

An Address by Moorfield Story, of Massachussetts, President of the American Bar Association.

Gentlemen of the American Bar Association:

The high honor which you have done me in making me your president, like every other honor, brings its own burden. From this universal law of compensation not even your presiding officer is exempt. When you adopted the constitution, which makes it his duty in opening each annual meeting to state "the most noteworthy changes in statute law on points of general interest made in the several states and by congress during the preceding year," you required him to make a pilgrimage through statutory deserts, and if the fruit which he gathers and presents for your gratification at this annual festivity lack something of flavor and piquancy, I beg you to remember the soil from which they sprang, and to reflect if you find his subject dull that it is you who selected it. It is, perhaps, fitting that you who prescribed the task, should, as you listen, share the labor which attends its performance.

In one respect, however, your president is unfettered. From his decision as to what is "of general interest" the constitution provides no appeal, and I enjoy, therefore, for the first and last time in my life, a position in which my determination of a constitutional question is for all purposes of the case, absolutely final. While you may realize how little of interest has been preserved, you certainly will never know all that has been rejected. I will, however, so far depart from the excellent rule which bids us give our judgments but not the reasons for them, as to say that I shall undertake to deal with the general tendencies of legislation as I have found them indicated on the statute books of the year rather than with the changes in the laws of each state, which, however important to the lawyers who practice there, must be learned by them directly from

*This address being too long to publish in full, the last subdivision entitled "Reorganization of Railway and other Corporations," has been omitted as of less interest than the portions here printed.

their own statutes, and as to which any statement that could be made within the limits of his address must necessarily be too general to be practically useful.

No one can read the statutes of a year passed by legislative bodies meeting thousands of miles apart, representing our oldest and newest civilization, and elected by communities differing widely in their component citizens, in their interests, and in their traditions, without realizing the essential unity of this country. The same problems confront us all alike, and are dealt with in the same way by Louisiana and Massachusetts, by Maryland and Utah, and often with apparently greater wisdom by the newer states.

Not less striking is the fact that everywhere our legislatures are occupied, not with fundamental questions of government, but with the refinements of civilization. The essential principles are settled; the general scheme is complete. It is with details of organization, with perfecting the machinery of civil life, that the american legislature is now occupied. We meet at a time when the greatest anxiety is present to us all. After a long period of repose, we have been suddenly awakened to find that many of our fellow countrymen are absolutely discontented with the conditions which surround them, and are ready ignorantly to apply remedies which the experience of the world has condemned. We are in the midst of a struggle to preserve the established principles of our government and our national honor, and while we may be sure that the result of the contest cannot be doubtful, the existence of the feeling which makes it possible is a serious danger to the state. But of all this discontent no trace is to be found on the statute books. The laws which have been enacted since this association last met suggest only profound peace and general prosperity. It is true that "Whats' done we partly may compute, but know not whats' resisted." But certainly discontent, if it exists, has not been strong enough to affect the legislation of the country.

Another thing that cannot fail to interest the student of political tendencies, is the rapid growth of the disposition to assert the general interest of the community at the expense of individual freedom, or perhaps, to put it more accurately, of individual selfishness. The underlying principle of socialism, that everything that a man owns he holds for the state, is asserted more and more frequently. This is not the doctrine of eminent domain, which involves adequate compensation. I refer to the steady and gradual appropriation to public use of more and more that we have been wont to consider

private property, accomplished sometimes by taxation, and sometimes by the exercise of that vague power known in our constitutional law as the police power. The statutes of every state contain laws that would have seemed unwarrantable invasions of private right not many years ago, and this tendency is quite as apparent across the Atlantic as in this country. The Irish land legislation, of recent years is a conspicuous illustration, and if enacted in the United States, would seem revolutionary to our land owners. This legislation, the collateral inheritance tax, the graduated income tax, the graduated tax, on the estates of deceased persons when adopted, the character and number of uses for which money is now raised by taxation, involve concessions by the community to doctrines, and are supported by arguments which may lead in the near future to consequences that will astonish us. I wonder what the farmers of New England and the south would say to the law enacted this year by the legislature of Utah, which, to insure the destruction of noxious insects, requires every farmer to clear up and burn all the dried leaves and rubbish in his orchard or vineyard by April 15th in each year. This may seem to us an extreme exercise of the police power, but the legislative record of the year affords many other illustrations of the general trend. The interdependence of men in every community is more and more recognized, and the law, if it does not inculcate the active benevolence of the Golden Rule, at least more and more frequently adopts the mandate of Confucius and bids no man to do to another what he what he would not have that other do to him. Just as surely shall we recognize the impossibility of letting each nation remain a law unto itself. Commercially, financially, and in every industrial and moral relation, loss or injury to one state is felt by every other, and the responsibility for preventable wrong must be borne by all. Whether we will or no, we are all learning to say with Garrison, "My country is the world, my countrymen are all mankind."

With these introductory suggestions I proceed to discharge my constitutional duty, and for convenience I will group laws as far as possible, according to the subjects of legislation, but I may say in explanation that the statutes of Iowa, Louisiana, and New York have not yet been printed in accessible form, and I am indebted to the officers of this association for what I shall say on the legislation of these states.

The congress of the United States has passed the appropriation bills. In this sentence are summed up all its claims to public grati-

tude for legislative achievement, though perhaps I may mention an act which permits the appointment to positions in the military and naval service of former federal officers who served in the confederate navy, not for its practical importance, but because it removes the last disability growing out of the civil war.

In the "Act making appropriations for the post-office department," however, congress has dealt a serious blow at the efficiency of the service, and for a time at least has prevented the execution of an admirable reform. Under the existing system each post-office is independent. The postmaster reports directly to the department in Washington and settles his accounts there. Such an organization multiplies work in every way, and, in the language of the postmaster-general, "It is in some respects, as if each private soldier in a great and growing army, reported directly to the commanding general, received his orders from him, and had little other supervision except what was possible from army headquarters." The postmaster-general proposed to reform the abuses growing out of this system by gradually consolidating groups of neighboring post-offices, so as to make them stations of a central office, the postmaster in each becoming a clerk responsible to the postmaster at that office. It is a plan which has long been in successful operation, and under it Cambridge, in Massachussets, a city of more than seventy thousand people, has been for twenty years a station of the Boston post-office and in charge of a clerk. This change not only increased the efficiency of the department, but it afforded a means of extending the provisions of the civil service reform law to the postal service, and of taking from the control of the politicians the largest body of offices that are still distributed as spoils. It was this result that aroused the congress of the United States. Senators refused to permit this patronage to pass from their control, and though the postmaster-general only asked congress to make the appropriation for the salaries of postmasters available also for the payment of clerks, and although he offered, if this was granted, to do the work for five hundred thousand dollars less than the appropriation asked, congress turned a deaf ear to his request, and at a time when expenditure exceeds revenue and every saving is important, not only kept for their own use the offices created for the benefit of the people, but charged the people half a million dollars for doing so, money which virtually is taken by them, since it is the price of letting them control the appointment of postmasters for their own political benefit.

Congress not only refused the request of the postmaster-general,

but by an amendment of the appropriation bill forbade any further consolidation of offices except within narrow limits, and ordered the re-establishment of separate offices in some cases where consolidation had taken place. The urgent demand of the citizens secured the exception of Cambridge from this amendment, and Towson, in Maryland, is also excepted for reasons which do not appear in the law.

This pernicious amendment is the only change in existing law "of general interest" made by the congress of the United States at its last session. Let us hope that this is not the calm which precedes a legislative storm.

I proceed now to consider the legislations of the several states, and first in order comes those acts which would be found in any digest under the heading of constitutional law.

The legislature of Louisiana has made a new departure in submitting to the electors a proposition for a constitutional convention, called to frame a new constitution of the state, but without power to change the existing constitution so as to effect or impair the bonded indebtedness of the state, or of any municipal, parochial or levee corporation thereof; or to shorten or terminate before the year 1900, the tenure of any existing state, parochial or municipal office except by abolishing this office, or to make any change in the present rate of taxation, the present seat of government or the laws relating to the levee system of the state.

At first blush it seems as if the legislature by this act expressed very frankly to its constituents a want of confidence in their ability to frame their own system of government. It is clear upon reflection that the act gives the voters an opportunity to express their satisfaction with certain parts of their constitution and to select representatives charged with the duty of changing only those provisions which have proved unsatisfactory. It may be doubtful whether the first limitation on the authority of the convention is necessary, since a state can no more impair the obligation of contracts by constitutional amendments than by statute, but it certainly must often be desirable to have the constitution largely revised without opening for fresh discussion questions which have long been settled to the entire satisfaction of the state.

The legislature of Ohio expresses its distrust of other representatives chosen by the people in a more unequivocal way, since in a resolution recommending a constitutional convention, it provides that it shall not sit more than ninety days, a limitation upon which much might be said, and which may lead to singular consequences.

of this association, Hon. Thomas J. Semmes, and drawn on the approved lines of municipal reform. The power is concentrated in the hands of the mayor, who has the right to appoint and remove all heads of departments, while all the other officers of the city are appointed after competitive examination, according to the principles of civil service reform. The classified service not only includes every officer except the mayor, the council-men and the heads of departments, but it extends to the laborers in the employ of the city.

The whole system is placed under the charge of a civil service commission consisting of three members, no one of whom has held or been a candidate for any municipal office during four years before his appointment. They hold office for twelve years, one going out every four years, and the first appointments being made accordingly. The civil service features of the charter are largely drawn from the Illinois statute, with a few changes intended to make it more effective.

The charter further provides that no franchise shall be granted unless the mayor and the executive officers of the city approve the ordinance of the common council, and that all street railway franchises shall be sold to the person bidding the highest percentage of the gross income to be derived form the exercise of the franchise. The legislature has supplemented its action in this matter by an act creating a drainage, and by another act creating a dock commission regulating wharfage, and making New Orleans practically a free port. These are very practical first fruits of good government and an earnest of more to come.

The officers chosen at the last election are among the best men of New Orleans, and the majority of the population is behind them. With such officers and such a charter New Orleans should enter on a new era and become a model for us all. We owe her much already, for her citizens by their triumph over long established and apparently deep rooted abuses have given us fresh proof that there is no community in the country which really prefers bad government, no city which cannot be redeemed, if its citizens are willing to do their duty. It is worth while to observe that the triumphant citizens owed none of their strength to the control of the offices, for these were held by their opponents, nor was their zeal fed by the hope of offices to come, for their first step was to put all possible offices beyond their control and under the rules of the civil service.

Under the head of municipal government perhaps attention should be called to the statute of New Jersey which requires every

city or department that does not insure the public buildings under its control to provide an insurance fund of its own by annually setting aside from the appropriation for the department to which the buildings belong, one per cent. of their value.

Utah allows mayors to veto single items in an appropriation bill—a very useful power.

Closely allied to reform in municipal government is the reform of the civil service, and I have already spoken of what Louisiana has done in legislating for New Orleans.

In Maryland an earnest effort was made to secure the passage of a law, but the legislature disappointed the expectations of reformers. It, however, has proposed an amendment to the state constitution, which, if adopted, will place the merit system beyond the reach of hostile legislation. In that event we may expect in Maryland the same gratifying results that we have witnessed in New York, where during the last year the constitution has proved too strong for the spoilsmen, and has defeated very partinacious and promising attempts to evade its prohibition. If, however, the amendment is defeated we may reflect that with public sentiment against it, the law, if passed, would hardly have endured. Wherever the people have had an opportunity to speak, as in New York and Illinois, they have always favored the reform, and we may hope that Maryland will prove no exception. In that case the legislature, in evading its responsibility, will have done the cause of good government a greater service than it could by any statute. Certainly there is no state where reform is more imperatively demanded, where the battle has been better fought, and where victory if won will be more thoroughly deserved.

In Utah the legislature has passed a law applying to all cities of 12,000 inhabitants or more, which places the fire and police departments under civil service rules, and requires that the highest on the list determined by competative examination shall always be appointed to office unless there is some good reason to the contrary. No fire or police commissioner, and no officer of either department, is permitted to take any part in politics, and the law forbids any attempts to influence the vote of any officer, and the levy and payment of any contribution for political purposes or in order to make a present to any officer of the department.

In Massachussetts the mischievous law of last year which gave any veteran a right to public office irrespective of fitness, has been declared unconstitutional by the supreme court, but the legislature

has endeavored to test the disposition of the court, and has passed a statute which permits the appointment of a veteran who has not passed the examination, and gives veterans who have passed under the rules an absolute preference. The natural gallantry of the Massachussetts legislature or the rising influence of the new woman has led to the insertion of a provision that the act shall give the veterans no preference over women.

Upon the whole the year with its enormous increase of the classified service by the orders of president Cleveland, the triumph of constitutional reform in New York, and the acts to which allusion has been made, has been marked by remarkable progress. Reaction here and there is to be expected, for reforms in this country or elsewhere do not move forward steadily, but progress toward their goal with halting steps.

The proper regulation of elections is a subject of the first importance in every free government, and it has not been neglected by the legislatures of the year.

In Virginia an act has been passed regulating primary elections in a single county, which if successful there, will perhaps be extended. It authorizes any political party to hold a primary election and regulate the method in which it shall be held, and the votes printed, cast and counted, leaving the local county committee to make any rules consistent with the act, and punishing severely violations of the act, fraudulent registration and bribery or attempt at bribery.

The expense of this primary election is to be paid by the party, and the committee is authorized to raise the money either by voluntary subscription or by assessing it equitably against the candidates, it being expressly provided that no candidate failing to pay his assessment shall have his name printed on the ballot. A somewhat similar act relating to another county contains no provision for assessing candidates.

The Australian ballot law is amended in various particulars, the most important being a requirement that with the names of the presidential electors the names of the candidates for whom they are expected to vote shall be furnished to the secretary of the commonwealth. The names of the electors are to be grouped under the names of the candidates, and the voter may indicate his choice of electors by marking the names of the candidates. This provision wherever it exists will interfere with the plan proposed in some states by which those who in the present campaign are dissatisfied

with the platform and candidates of their party may assert their principles and nominate electors to represent them, leaving these electors, if chosen, to exercise their constitutional right of voting as they please in the electoral college. It adopts the prevailing practice at the expense of constitutional theory, and prevents the voter from casting his ballot in favor of an unpledged elector. Whatever its intent, it makes bolting more difficult.

New Jersey has supplemented her registration law by stringent provisions requiring registration by streets and houses in larger cities. Among other provisions is one for the protection of candidates, which might well be extended for the benefit of other citizens. This makes it a misdemeanor to solicit from a candidate money or other property, or to urge him to purchase any ticket to a ball or other entertainment, with a provision that this shall not apply to a request fora contribution from an authorized representative of the party nominating him. The proviso is unfortunate, for the candidate is the one person who should not be allowed to contribute at all.

Ohio has passed an excellent and very stringent law against corrupt practices which forbids any candidate for representative in in congress, or any office created by the constitution or laws of the state, to contribute or promise for campaign purposes, directly or indirectly, more than $100.00 for any number of voters up to 5,000, $1.50 for each additional 100 voters between 25,000 and 50,000, and nothing for any number of voters above the large number.. This makes $650.00 the maximum contribution which any candidate can make. Returns of receipts and expenditures in great detail, with names, dates and amounts, are required from every candidate for nomination or election, and from every committee or person receiving or expending money or contracting obligations for a committee. No officer elected can receive his commission or enter upon his duties till his return has been made. Any violation of this statute, or any other act forbidden by law, committed by the candidate or his agent, or any political committee or party or their agent with his connivance or that of his agents, makes his election void, and proceedings to vacate his office on these grounds may be brought at any time during the incumbent's term. Such proceedings are in every way made easy, and are given precedence in the courts.

The act provides that no one shall be excused from testifying to any violation of its provisions, and to meet the objection that a witness cannot be compelled to criminate himself, it adopts substantially the language of the act passed by congress February 11, 1893,

and sustained by the supreme court in Brown v. Walker. Though lawyers before this decision might well have divided, as did the court, on the question whether a witness could be compelled to testify under this act, it is extremely fortunate that the court decided as it did. Were the law otherwise, offenses like bribery, which are most dangerous to the public, must go unpunished. Perhaps we may regard the decision as merely one illustration of the tendency to assert the public interest at the expense of private right. Salus populi suprema lex.

Another statute amends the Australian act by providing that if the same candidate is named for an office by two nominating bodies, the name shall be printed once, and the candidate must choose on which list his name shall appear; if he fails to do so, it is printed on the list first presented.

Utah has passed a similar law, forbidding every kind of electoral corruption and punishing both the giver and taker of a bribe. It goes further than the Ohio statute by making it a penal offense punishable by fine and imprisonment "to give, procure or offer any office, place or employment and to promise or procure or endeavor to procure" either, in order to influence any voter. We therefore find Utah making that a crime, without which we are told in our most highly civilized communities that political campaigns cannot be fought. In this our youngest sister leads the way for us all.

This act compels testimony by a provision like that of the Ohio statute, and expressly forbids any attempt by employers to intimidate or influence their workmen, aming and prohibiting in terms all the devices with which we have become familiar, such, for example, as notice that in case a particular candidate is elected, the factory will close. Utah has also passed an Australian ballot act which, however, pays its tribute to regularity in allowing the voter, by marking his party's name, to vote for all the candidates.

South Carolina has passed a careful registration law which enforces rather a higher educational test than usual, since it requires of the voter ability to read any section in the constitution, or "to explain" it when read to him by the registering officers. This statute has not adopted the Australian law, but requires separate ballots and ballot boxes for different candidates, a system which insures a slow if not a full vote.

After January 1, 1898, residence for a certain time in state, county and precinct, the ability to read and write any section of the constitution, or in the alternative proof that the applicant owns and

has paid all taxes collectible during the year on property worth $300.00 is required. Whatever may be the intent and effect on certain voters of these provisions, it is difficult to say that they are not in themselves responsible.

Maryland has passed a new law to regulate registration and elections which contains elaborate provisions.

Massachussetts has passed an act to prevent false registration in Boston, and another to regulate caucuses in that city, while a third amends the general caucus act so as to make it more effective.

Another law provides for the use of a stamp by the voter in marking the ballot, and also for the gradual introduction of the McTammany voting machine, "whose inventor may be advised in passing, never to slur the first syllable of his name if he wishes to avoid partisan misconception."

The legislature of Louisiana has passed a ballot act which applies the Australian system in its strictest and purest form to the city of New Orleans and in a somewhat modified form to the country parishes, a concession apparently to the principle of local option. This act in prohibiting any person from assisting another in the preparation of his ballot unless the voter is physically unable to do it himself, virtually imposes an educational qualification under guise of an election regulation. Incentives to education, however, cannot injure any community.

Louisiana has also adopted a stringent registration law which will make fraudulent registration nearly impossible. Upon the whole, we may congratulate ourselves that the people of this country are determined their will shall not be defeated by any fraudulent device.

It has been said that every community has as good a government as it deserves, and the success of popular government must in the long run depend on education. The barbarians that overthrew Babylon and Rome came from without. The dangers to our own civilization come from barbarians within, and the ignorant and discontented classes which exist in every state. It is natural, therefore, to inquire next what our legislatures have done for education, and it is pleasant to find that it has not been neglected. Kentucky provides for a very careful examination of teachers under a system which commits the preparation of the questions to the state board of education, and guards very carefully against any possible collusion between examiners and applicants. Among other required subjects are physiology and hygiene, including "the effects of alcoholic

drinks and narcotics on the human system." Owing to the persistent efforts of temperance reformers instruction in the last subject is now required in many states, including this year Mississippi and South Carolina, but many of the most highly educated physicians doubt the effect of the instruction given and the wisdom of the requirement.

The legislature of Kentucky has also passed an act requiring every parent, or person in charge of a child between seven and fourteen years old, to send such child to school for at least eight consecutive weeks every year with certain exceptions, including among others the inability of the parent from poverty to clothe the child properly, a case for which, however, some public provision should be made, as in such cases education is peculiarly important.

A further concession to education is made by the acts which forbid the managers of any turnpike road to charge any toll against the scholars on their way to school, an immunity which they share with ministers on duty, person going to and from church, and lastly with funeral processions.

New Jersey has taken an important step by providing a system through which teachers who consent can contribute one per cent. of their monthly salary to a fund, and on retirement after a certain period of service receive a pension out of the fund so created. A pratical provision for the highest education is found in the act which permits the authorities of certain cities to purchase lands and erect buildings for a library, reading room, art gallery and museum.

Ohio also creates a pension fund for teachers in certain cities by providing for a similar deduction from their salaries, and placing the fund thus created under the control of seven trustees, to wit, the superintendent of schools, three elected by the teachers, and three by the Board of Education. Another act adds to the qualification of common school teachers a knowledge of civil government, which requirement is found in statutes passed this year by Mississippi and South Carolina. We have begun to realize that a knowledge of civil duty may be taught and is not necessarily born in every American citizen. Another statute deals with the question of school books, and provides that they shall be selected and the prices at which they may be sold shall be fixed by a board consisting of the Governor, Secretary of State, and Commissioner of Schools. The publisher must accept the price fixed or his books cannot be bought. Text books once adopted by a Board of Education cannot be changed for five years unless three-fourths of the board agree, and the law

provides that these boards shall buy the books and sell them to the public at a limited advance upon the cost, but with power in proper cases to make no charge. This is intended to secure good and cheap books for scholars and to guard against the evil of constant changes secured by the importunity of publishers.

Utah deals with this subject most liberally. The university of Utah is made the highest branch of public education in the state, and its courses must be so arranged as to supplement and continue the instruction of the schools, and to afford a complete and thorough education in arts, science and literature, and in such professional branches as may be included in the curriculum. Instruction in the preparatory, normal and university courses is made free to actual residents of Utah, except that an annual entrance fee of ten dollars to residents, and fifty dollars to non-residents may be required, and a reasonable charge may be made for teaching in studies not pursued in the regular course. One hundred free scholarships are established in the normal school.

The rich are tempted to liberality by provisions that the doners of certain gifts to found professorships, lectureships, or scholarships, may name them and appoint the first incumbent, while larger benefactions entitle the donor to prescribe how incumbent shall be named forever. The authority is reserved, however, to reject nominations and to remove any incumbent for cause. With a gallantry, perhaps to be expected from Utah, which has been especially favored by the gentler sex, the schools and university are open to women on equal terms with men, and female teachers of any grade receive for like service the same pay as men of the same grade.

The state makes further provision to the cause of education by an act which provides for the establishment of free public libraries in all the cities and towns, and the levying of a tax for their support.

Mississippi creates a state board of examiners to prepare questions and superintend the examinations of all who seek appointment as teachers and superintendents of schools.

South Carolina provides a syestem of free schools under a state superintendent, and a board of education empowered to prescribe rules for the government of the schools and the examination of teachers, to define courses of study and select text books, and also, as in Ohio, to deal with publishers. "The Colored Normal Industrial, Agricultural and Mechanical College," is founded for the higher education of colored youth. It receives all the property at Claflin

College and an endowment of five thousand dollars a year for five years, to be spent on buildings, and to this are added as an aid in erecting them forty able-bodied convicts, who are to be transported and maintained without expense to the college and returned after the buildings are done.

Massachussetts provides fifty-three scholarships in the Institute of Technology at Boston, and as many in the Polytechnic Institute at Worcester, and Maryland gives free text books in all public schools at an expense of one hundred and fifty thousand dollars annually. Such is the legislative contribution of the year to the cause of education.

There are few legislators now who do not regard the interests of labor, and the statute books are full of legislation in its interests, real or supposed.

New Jersey requires every corporation or establishment engaged in manufacturing, mining, quarrying, or lumbering to pay its employes at least once in two weeks, each payment to be of all wages due to within twelve days. All contracts for other payments, except at shorter intervals, are declared void.

Maryland makes a similar provision, restricted, however, to laborers employed by coal mining corporations in Allegheny county, and Massachusetts compels persons engaged in manufacturing and employing twenty-five persons to make weekly payments and forbids any special contract to the contrary. In Utah the wages of employes for one year are preferred in case of the employer's insolvency.

Ohio provides that all persons using wheels or belts made of or covered with emery must furnish blowers which will carry the dust away from the operatives to power receptacles or the open air. Massachussetts provides that no traversing carriage of any self-acting mule shall travel within twelve inches of any pillar in factories hereafter built.

Maryland prohibits any employer of four or more persons from using coal oil or any inflammable compound in any shop or factory, and also requires fire escapes.

Utah secures the safety of coal miners by requiring a quarterly inspection of the mine, safety appliances and proper construction, and prohibits the employment of any woman or any child less than fourteen years old in any mine or smelter. Eight hours also is made the period of employment in underground mines and in smelters and reduction works.

The arbitration of labor questions is the subject of legislation in

Ohio and Utah. The first extends the provisions of its statute to cases where several employes on one side are opposed to aggregation of their employes on the other, and directs the board of arbitration to investigate and publish a report assigning the blame at the request of either party, if neither a settlement nor arbitration is had by reason of the other party's opposition. Utah creates a board of arbitration consisting of one employer, one employe, and a third person who is neither, provides for an investigation of and report on labor questions, and makes the decision binding on parties who join in requesting action or appear before the board until either party has given the other notice of his intention not to be bound and for ninety days thereafter.

The state also makes the blacklisting of any employe, whether discharged or leaving voluntarily, a felony punishable by imprisonment and fine.

Georgia makes any contract between master and servant void, which exempts the former from liability for negligence.

In Utah "fellow servants" are defined as persons in the service of the same employer not entrusted with authority or control over others and belonging to the same grade of service, when working together at the same time and place to a common purpose, but persons engaged in different departments of the employer's service are not to be so regarded. This is intelligible and not unreasonable.

Mississippi adopts the same rule, and gives the employe the same right to recover as any other person, not only where the injury results from the negligence of a person charged with duty of control, but when it results from the negligence of a servant engaged in other department of labor or on another piece of work, or in case of a railroad on a different train of cars. The law further provides that knowledge by the injured party or the unsafe or defective character or condition of any machinery, ways or appliances shall not affect his right to recover except in case of engineers or conductors in charge of unsafe cars or engines voluntarily operated by them.

Mississippi contributes, however, what seems a novelty in legislation by an act which provides that where death occurs from negligence under such circumstances that the deceased, if he had survived, could have recovered damages for the injury, the fact of instantaneous death shall be no bar, and an action for such damages may be brought by "the widow for the death of her husband, or by the husband for the death of his wife, or by a parent for the death

of a child, or by a child for the death of a parent, or by brother or sister for the death of brother or sister, or all parties interested may join in the suit, and there shall be but one suit for the same death, which shall enure to the benefit of all parties concerned; but the determination of such suit shall not bar another action, unless it is decided upon its merits. In such action the party or parties shall recover such damages as the jury may assess, "taking into consideration all damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit."

These various plaintiffs do not, however, necessarily profit by the victory. The act provides that, no part of the sum recovered shall go to the creditors of the deceased, and prescribes rules for the distribution of the damages. If the deceased leave husband, wife or children, the damages recovered shall go wholly to them although many other relatives may have joined in the suit. To these latter plaintiffs is applied the rule which congress adopted in distributing the Alabama award where insurers whose claims were paid were not allowed to receive their money. Only in case the deceased leave none of the relatives named can the legal representatives of the deceased sue, or the creditors profit by the recovery. No counsel who has ever defended a suit for damages can regard such legislative without shuddering at the possibilities which it entails. The descent of a large family after an accident in Mississippi must resemble the foray of a Highland clan a century or two ago, and be equally disastrous to its victims.

While as a rule, the legislatures are adding to the burdens and responsibilities of manufacturers, they occasionally do something to help them, and it is interesting to compare the legislation of Massachusetts and Mississippi, for it indicates a movement now in active progress.

Massachusetts authorizes one of its largest manufacturing corporations to manufacture, buy and sell cotton or any other fibre or their products anywhere in the United States, and to invest its capital in or out of the state.

Mississippi, perhaps, by way of amends for the statute just referred to, offers immunity from all taxation for ten years on all permanent factories or plants established before January 1, 1896, for any of a great variety of purposes. It is doubtful, however, whether this benefit can offset the risk of injuring an employe in Mississippi.

Every one familiar with the subject knows that the advantages which the south offers, especially the present absence of burdensome

legislation in the supposed interest of labor, are tempting manufacturers to migrate, and the subject invites longer consideration than is possible in this address.

The feeling now so rife in this country, against great aggregations of capital, and perhaps not wholly unjustified, finds expression in many statutes.

Mississippi leads with a drastic statute which allows the producer or owner of any commodity whose cost or price is affected by "any unlawful trust or combine," to recover the sum of $500 and all actual damages in a suit against any part of the "combine" or any of its attorneys, officers or agents, whether or not all the parties to the trust are known, and whether or not it was made or exists in Mississippi. This remedy is extended to any person if cost or price of his labor is injured by any such combination. In any such action evidence that the combination intended to affect cost or price is made conclusive evidence that it was affected, and the same penalty and damages may be recovered from any railroad, transportation, telegraph or telephone company, which is a party to such trust, or by reason of it refuses to transmit any message or commodity from one place in the state to another. We need not even consider what questions of fact might be submitted to a jury in a suit under this statute, in order to reach the conclusion that many lawyers and other gentlemen of high respectability will find it safer not to visit Mississippi.

Utah, by a statute drawn on the more usual lines, prohibits any combination of persons to control or affect the price of professional services or any commodities, prescribes a penalty of fine, imprisonment or both, for any violation of the act, makes any person violating it liable to any injured party for the damages sustained, and makes all contracts void which contravene the law.

With these absolute prohibitions, which have been found in practice easy to enact but difficult to enforce, may perhaps be associated conveniently another class of statutes intended to regulate, as far as possible in the interest of the public, the great transportation and other like corporations.

Kentucky requires every corporation or person running a railroad more than five miles long to run at least one passenger train each way every day but Sunday.

New Jersey provides for the abolition of all crossings by a highway and railroad at grade in certain cities upon terms more liberal to the railroad corporations than have been imposed in some other

states. The court must first hear the application, which may be made either by the city or the railroad company, and if satisfied that the change is proper and feasible without unreasonable expense, may appoint a commission to report a plan with full details, which the court may alter or reject. Of the expense the city is required to pay so much as arises from changes in pipes, sewers, the grade or location of streets, or anything done to them outside the railroad location, and also all claims for damages caused thereby, and the railroad company pays the rest.

Ohio requires interlocking switches wherever an electric street railway crosses a steam railroad, or else a full stop before the crossing, and forbids the construction of any future crossing without such a switch. Another act requires railroad corporations to gradually equip all passenger cars with portable chemical fire extinguishers.

Mississippi, perhaps, by way of further encouragement to manufacturers, provides that the railroad commissioners may permit manufacturers to connect tracks built by them with railroads, and forbids the railroad companies to sever the connection while the business continues and the regulations of the company as to safety are observed.

Another act allows two railroad companies to run trains at a crossing without stopping, if interlocking switches or other safety devices satisfactory to the railroad commissioners are established.

South Carolina authorizes its railroad commissioners to require connecting roads to so run their trains that connections shall be close, if this can reasonably be done. The legislature has also fixed passenger rates, has ordered first and second class tickets, has required railroad companies to pay the charges of all previous carriers on freight delivered to them, whenever they can be collected from the consignee and do not exceed half the value of the freight; and has forbidden all discrimination between carriers at common junction points and all failure to afford equal facilities to all. The act provides that any consignor may designate the route by which his freight shall be shipped, and that the routing shall not be varied. The penalties for any infraction of these provisions are sufficiently severe.

New Jersey requires every street corporation seeking a location to file in the proper municipal office a full description of the route, showing the location of the poles, conduits and tracks, and provides for public hearing before the location is granted, adding the salutary conditions that this shall not be done without the consent of the per-

sons owning at least half the land abutting on the route taken by linear feet. It also provides that street railways shall not carry freight or express matter, except their own supplies, unless heretofore engaged in doing so. Massachusetts, on the other hand, in several cases, authorizes such corporations to carry freight.

These statements touch a very important question. On the one hand the railroad corporations pay for their locations and are subject to severe provisions fixing the character of the service and accommodation which they must furnish and the precautions which they must take to insure safety. All over the country they are being compelled, at very great expense, to discontinue crossings at grade. The street railway, on the other hand, has its location given to it in most cases; the whole line is a grade crossing; it is free from the requirements imposed on its rivals, it supplies no stations and comes nearer to its passengers' destination at both ends of his journey than is possible for the locomotive. The street railway, moreover, is reaching out until in some states it is possible almost to cross the state in a street car. If now the latter corporations are permitted to carry freight, express matters and mails, as well as passengers, the effect on the earnings of the railroad corporations is likely to be serious, and as the street railways with freight, as well as passengers will occupy more and more fully the public highways, cities and towns will be obliged to build for ordinary traffic new streets in place of those which they have given to the street railway corporations. The opposing interests will doubtless engage soon in many legislative battles, and finally, when experience has determined which system best serves the public, the contest will end, and the railroad corporations may find the value of their franchises much diminished without receiving any compensation.

Massachusetts has made a new departure from her previous practice by incorporating the Massachusetts Pipe Line Company, with authority to lay its pipes all through the state, and to supply fuel and illuminating gas to cities and towns and gas companies, and also to acquire the works and distributing system of any person or corporation engaged in selling gas, and continue its business. The state fixes the price at which its gas must be sold. This charter has in it great possibilities for good or evil.

Maryland has fixed the maximum charge for telephone service between any two cities, towns or villages in the state, the rate varying with the distance, and enacts that the steam heating law shall not apply to trains carrying passengers to participate in the cere-

monies attending in the inauguration of the president. Why they should be treated as outlaws and left at the mercy of the car stove is not explained.

Georgia provides that a bank whose capital is impaired must at once make it good by transfer from its surplus or undivided profits, or, if these are not sufficient, by assessing its shareholders. Another act provides that circulating notes shall be issued to any bank which deposits with the treasurer of the state, bonds of the United States or of Georgia in double the amount of the notes issued. The currency of a state bank thus assured should be of unquestionable value, and acts like those may help us to deal with the problem of our currency.

Before leaving the subject of corporations, attention should be called to the very careful revision made in New Jersey of its general corporation law, to a similar act in South Carolina, and to a statute in Massachusetts which extends the law affecting the liability of the officers and shareholders in Massachusetts corporations to the officers and stockholders in foreign corporations hereafter establishing a place of business in that state. The public, by bitter experience, is beginning to realize the disadvantages of letting men who propose to do business in one state, incorporate under the laws of another, a practice which has proved most useful to fraudulent promoters.

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NOTES.

The new woman has come to stay. In all fields of industry and thought they are fast coming to be recognized as important rivals in the competition for business. As lawyers they are not complete and utter failures as two or three examples of their sex have proved in this state. In New York city recently one of the daily papers reported in a single issue the appointment by courts of record of three different women as receivers in as many different cases.

At this time, when the income tax decision and legislation along the line of the income tax law have been receiving so much attention from the various political parties, the leading article of this month's issue of the MICHIGAN LAW JOURNAL will be found very timely. The subject has been very carefully handled in the article and should prove of considerable interest to lawyers.

The greater part of the address of the president of the American Bar Association is also given in this number. The portion left out is of less general interest than this which here appears. Through this address is given a very interesting view of legislation in the various states of our Union, and given too in such a way as to show that the trend of public thought in widely separated sections of our country as expressed by the laws adopted, is in the same general direction.

An opinion was filed in September in the New York supreme court, appellate term, in case of *Elsie R. Coale* v. *Julius J. Suckert and Maria L. D. Suckert*, which decided that notwithstanding an agreement by stipulation between parties to a suit to share in the expense of employing a stenographer for taking testimony before a referee, such agreement or stipulation not having been filed with the latter, both parties to such suit and stipulation are jointly liable for the whole amount of such expense. This was held as charging both jointly and passes over the fact that the testimony was taken as collateral to divorce proceedings and that the stipulation for sharing the expense was between husband and wife. The court states that "the burden of proving that the plaintiff had knowledge of the special agreement was on the husband, and as he failed to satisfy the justice that it was made known to the plaintiff so as to imply an assent thereto upon her part, the judgment against him is not without evidence to sustain it."

LEGAL MISCELLANY.

During the last few weeks England and Scotland have at last made a somewhat tardy but unmistakably national expression of their indignation at the reign of massacre established *en permanence* on the Bosphorus. It is well that this should be so. A nation that did not feel moved to say "Damn," and say it out full-mouthed in the hearing of God and man, on seeing the slaughtering that has gone on and is going on, in the dominions of the Grand Turk, would be a nation without a semblance of a moral sense. But in the midst of our indignation there has been very inadequate recognition of the fact that the guilt really lies at our own door. If the Assassin reigns—

". . . reseated in his place of light,
The mockery of his people and their bane,"

it is England who placed him there. We sent our fleet through the Dardanelles to protect him against the Russians, who, after incredible hardships heroically surmounted, were in a position to have hurled him into the Bosphorus. We summoned the Berlin congress in order to re-establish his authority and consolidate his empire. It was England and none other that canceled the clause in the Treaty of San Stefano giving Russia right to compel the Turks to guarantee the Armenians against outrages and massacre. And it was England, through her accredited representatives, who, while re-enslaving Macedonia and Armenia in the name of public law and the independence and consolidation of the Ottoman Empire, filched like a footpad the island of Cyprus under cover of a fraudulent convention which binds us to defend the Assassin against his executioner, but which is to this day unrecognized by the public law of Europe and repudiated by the moral sense of our own people. A pretty St. George, indeed! Even Dick Turpin would have recoiled from such a piece of petty larceny as that which made England appear as the piratical Pecksniff of Europe.—From "The Eastern Ogre; or, St. George to the Rescue," by W. T. Stead, in November *Review of Reviews*.

BOOK REVIEWS.

HALE ON TORTS—Handbook on the Law of Torts. By WILLIAM B. HALE, LL. B. St. Paul, Minn.: West Publishing Company. $3.75.

This volume is one of "The Hornbook Series" published by the West Publishing Co. The series consists of elementary treatises on the principle subjects of the law. The special features of these books are, 1—A succinct statement of leading principles in black letter type, 2—A more extended commentary, elucidating the principles, 3—Notes and authorities.

Although the law of torts has been frequently and ably treated by other authors, and by some in a more elaborate and exhaustive manner, still this volume fills a needed place. It affords the busy and hurried practitioner a source to get the law in a condensed form, and all the more recent decisions, wherein the various points referred to are discussed.

In fact it is an abridgement of larger works on tort, but it is so arranged that if a lawyer wants to get an accurate glance of any case of tort he has in hand, he can obtain a correct view of the subject. If he desires to make an exhaustive study of any branch of the law, he will find this book will open up to him the field and direct him to the sources from which he can readily find what he needs to exhaust the information on that subject. Take, for instance, the laws of negligence. The author gives a condensed definition as to what negligence is, and then proceeds to give the essential elements of actionable negligence, such a failure to exercise commensurate care involving a branch of duty, resulting proximately in damages to the plaintiff.

The author also discusses in a concise and brief way the law of contributory negligence as a defense to torts for negligence. If the plaintiff's conduct was negligent, and his negligence contributed to the injury, this is a full defense to the action for damages for injuries sustained. From the chapter on negligence, which is comparatively short, a lawyer can quickly obtain a correct view of torts arising from this source and the defenses to mode to the same, and if he wishes to write an exhaustive brief on these subjects, he can readily connect on to all the branches of learning on these subjects. On the whole, it is a desirable book to have in a working library as a text book for ready reference.

HAND BOOK ON THE LAW OF TORTS—By WILLIAM B. HALE, LL. B. Author of "Bailments and Carriers," "Damages," etc. St. Paul, Minn : West Publishing Co. 636 pp. Price, $3.75 delivered.

This book is one of the series now published by the West Publishing Company, covering almost every subject known to the law, and as far as this series has been offered to the bar, it has proved a great aid to it. Each volume affords a short and concise statement of the up to date law, on the subject it purports to treat, with most modern and ample authorities or cases to sustain the same. With such a series as has already been published, together with the series proposed to be published, the practicing lawyer can prepare a brief in less than half the time it used to take. He can collate the law on the subjects to be discussed quickly and feel too that he has obtained all the modern as well as the old law on the subject.

This volume is perhaps more satisfactory in its abbreviated form because the subject of torts is diversified and broad in its application. The common law gave a very wide scope to actions in form *ex delicto*, and the statutes of the different states have extended their scope, rather than contracted them. A large part of the time of the courts is taken in trying damage suits, and no successful attorney brings a suit without carefully examining the law of his case. No text book is comprehensive enough to afford him all he needs on the particular matter he is investigating. He must have, not only the elementary law, but he must have all the cases that throw light on the point of investigation, and in order to feel safe in his law, he must have all the best considered and most recent decisions.

This book is concise in definitions, clear in analysis, ample in citations and it is full enough to suggest the proper line of investigation. The book is a valuable one in a lawyer's library.

CURRENT LITERATURE.

One of the oldest and most reliable magazines published in the United States is *Littell's Living Age*. It has, through its more than fifty years of existence maintained, invariably, the highest degree of literary excellence. The publishers now announce certain "New Features" which will greatly enhance its value in the eyes of every intelligent reader.

The first of these new features will appear in the November issue—to be continued monthly thereafter—in the form of a supplement containing three departments, namely: Readings from American Magazines, Readings from New Books, and a list of the Books of the Month.

This "Supplement," which cannot fail to be of great interest and profit to its subscribers, will add about *three hundred pages* annually to the magazine with no addition to its present price.

In addition to the supplement the field of *The Living Age* will he still fnrther extended so as to include, during the coming year, occasional translations of noteworthy articles from the French, German, Spanish and Italian reviews and magazines.

In the November number of the *Atlantic Monthly* appears the first of a series of exceedingly interesting reminiscenses covering the last fifty years of Colonel Thomas Wentworth Higginson's life under the apt title of "Cheerful Yesterdays." Colonel Higginson's career as writer, soldier, public servant and man of letters covers the last half century, and there is hardly a man or a movement of that time that he has not come into intimate relations with. These autobiographical papers, in a cheerful tone, really cover much of the most important history of this long period. In its last analysis the peculiar feature of the present presidential campaign is the unrest of the agricultural class. This number contains a very lucid explanation of the Causes of Agricultural Unrest by Professor J. Laurence Laughlin of Chicago, who has given much time and trouble to gathering the facts and making a clear presentation of the whole subject. Charles Egbert Craddock begins a novel of Tennessee Mountain life, which, however, is by no means confined to mountaineers, and brings in dramatic contrast to the queer life of this community the conventional society of the west—a novel full of power as well as of picturesque charm, which is called "The Juggler."

The *Review of Reviews* for November publishes several important and interesting articles on the latest phases of the Eastern Question, especially from the British point of view. Mr. W. T. Stead's survey of the subject, entitled "The Eastern Ogre; or, St. George to the Rescue," is extremely characteristic and suggestive, a quotation of which appears in the department of "Legal Miscellany" in this magazine. "What should be done with Turkey?" one of the most pressing problems of the hour, is given its fair share of attention. There are also a series of letters on the political situation in the closing days of the campaign in the great states of the middle west. These letters were written by fair-minded and trained observers of American politics, and are valuable as giving truthful pictures of one of the most exciting presidential contests in our national history.

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THE COURTS OF INDIA AND CEYLON.

EDWARD S. GRECE.

When it is remembered that the island of Ceylon, and far the greater part of India, are colonies of Great Britain, and that we, ourselves, were once a dependency of that empire, and from it derived many, if not most of our laws and customs, and our modes of administering our laws, and the trial of our causes in the tribunals established for that purpose, it will not be difficult to imagine that the manner in which the courts in the countries of which I write are conducted, is very much like our own. When it is remembered that Great Britain has exercised her powerful influence over India for about one hundred years, that if she did lose, by the folly and tyranny of her king and ministers, her colonies in the New World, she immediately transferred that seat of colonial empire to the far ancient East; even seated the defeated and humiliated Cornwallis of Yorktown, as, practically, the first Governor-General of India, and that, therefore, during as long a period as the whole life of this nation, Great Britain has been building and establishing her influence and has taken absolute control of a people occupying a territory half as large as our present area, and having a population four times as numerous as we are to-day, one cannot fail to realize that those agencies by which she administers justice and enforces her decrees, are not likely to be very different from those she employs at home, and, therefore, as we know not unlike our own American institutions established for like purposes.

Of course one first visiting an oriental country enters what to him seems almost another world. When your ship anchors in the harbor you notice that all the people you see are dark colored and many of them nearly naked. Clothing with them is at a decided discount. Amid the noise and hub bub of naked young urchins crying "dive, dive, dive," for your change, that you may see them go down to the bottom of your ship among the sharks as fearlessly as we as boys would in the old mill pond at home, you descend the gang plank and are landed. Everything is strange. I use this comprehensive term without going into particulars as to the strangeness of people and things. While this strangeness and other world appearances of men and things seem everywhere upon the surface, when you first land, after one has been there for a little time it wears away. I am speaking now of India and those parts thereof where the people acknowledge the authority of the Empress of India and the sway of British power.

At your hotel, in the shops and everywhere for all necessary purposes English is spoken, and one soon becomes accustomed to the conditions surrounding him.

Society and govermental affairs assume two almost distinct phases, but nowhere under any circumstances to my notion do these separate shapes appear so clearly outlined as in the courts of justice. Being a lawyer I naturally made it a point to visit the courts in all of the cities where and when opportunity offered. It would not be possible to give details of these visits, and if I did the narrative probably would not be interesting or entertaining.

The places or buildings in which the courts are held are not infrequently the palaces or parts of palaces of former native kings or princes. "How have the mighty fallen!" Where once seated in all their oriental splendor and despotism, the Eastern Prince and ruler in the very kingly court yards where he sat in his gorgeous adornments, and held his numerous wives basking in the sun and gamboling and bathing in the open bath for his pleasure and gratification, now sits the representative of the authority of a foreign ruler administering the laws dictated by a power whose seat is more than seven thousand miles away.

Kandy was the last capitol of these ancient kings of Ceylon. It is the most beautiful spot I ever beheld. It is not my purpose to attempt to describe it here. Were I to do so I should fail. On the bank of the picturesque lake, made by damming a small mountain stream these kings had built their palace, in the audience room of

which the court for that part of Ceylon is held. The building consists mainly of a roof supported by numerous beautifully carved sandal wood columns properly arranged in uniform rows. As you pass down the long aisle of the open room, open on all sides to the free passage of air in that warm climate, you behold, seated on his elevated bench, the judge. He is not an Englishman. He is a native of Ceylon. A large fine looking man, dressed in the lightest and thinnest of materials, as all, who wear clothes, dress in the tropics. He has in his every appearance and bearing the look of a judge. His face is dark, but his every feature shows intelligence. Seated below him is the clerk, also a native, and about the semi-circular table in front of the clerk's desk, are seated many lawyers who are awaiting their chance to be heard in some suit pending or about to be tried. The members of the bar all bear the appearance of culture and ability. They are nearly all natives of Ceylon.

I sat for a time in the room and looked about me. I was in the midst of two civilizations—the Western and the Eastern; but it was the Western mode of administering justice in the Eastern world. Hardly a man in the whole court but was not a native of the island, in which the old hymns tell us "only man is vile," yet perfect order and decorum reigned everywhere.

At the right of the judge stood an almost naked man, with no garments on except a cloth about his loins, telling his story to the patient and honest judge, about the wrongs he has suffered at the hands of another man who was trying to deprive him of his land. He spoke in his native language, and while the judge doubtless knew the language as well, or better than he, yet as Ceylon is an English colony, England sees to it that all business is done in the language of the Empire. The judges try all civil cases and most of the criminal cases.

I had the advantage of having with me Mr. J. N. Chatterji of Alligarh, India, N. W. P., a native lawyer and one of the most agreeable gentlemen I ever had the pleasure of meeting. My friend did not altogether relish some of the results of criminal trials in his experience. He narrated instances to me of what he claimed were great wrongs done, especially, to the natives by foreign English judges.

My friend and I being a little inquisitive, asked permission to look through the offices of the clerk of the courts. We were very kindly allowed to do so by the native gentleman in charge, and were pleased with the good order and system adopted in everything.

The method of keeping records and papers is much the same as in the English offices. The papers appear more cumbersome than ours, but their mode of pleading is much simpler. They have a simple way of making a complaint or information in all civil cases, like that which resembles the mode adopted in many of the states of this Union under their codes. This makes much simpler the complicated course of pleadings of the English Common Law. I must not forget to say that the clerk's offices are a part of a Buddhist temple, or rather of the outer building of it called the Temple of the Tooth, which is regarded by the Buddists as one of the most sacred spots in the world; yet the priests, having charge have leased this portion of the outer buildings for these temporal purposes to assist in settling disputes about worldly things.

During my wanderings in India, I visited several courts while in session. At Madura, an ancient city of southern India, the rude and iconoclatic English have taken possession of a magnificient ancient princes' palace which is supported by seven hundred columns. This has been converted into courts for lawyers, in which wag their "endless tongues." Here and in another structure are held the highest and lowest courts of the province. Like Ceylon, many of the judges, especially of what are called the "courts for the trial of small causes," having jurisdiction about the same as our justices of the peace over minor litigations, are natives, and a fine lot of gentlemen they are. I was very fortunate in meeting several of these gentlemen as well as the native judges of the High Court of Judicature at Madras. I think I am not speaking disparagingly of our American bar, when I say that these native judges and lawyers of India are the equals of any of our American jurists or lawyers. They are all graduates of the best colleges and universities in India, many of Oxford and Cambridge, and have devoted their lives to their professions.

An amusing incident occurred in connection with my acquaintance with a native judge of Madura, which is worth telling in this connection. While I was eating breakfast one warm morning in October, 1895, in the station of Madura (the station is the only hotel in this city of two hundred thousand people), a gentleman came in dressed in native costume, seated himself at the table and soon began a conversation with me. We exchanged cards, by which means I had the pleasure of learning his profession and position. Being desirous of extending my acquaintance with such men in India, I invited him to ride with me in my car which I had all to myself,

being assigned the car set apart for Europeans. He informed me that he would like very much to do so, but as the car was so reserved, what would doubtless be to both of us a pleasant and entertaining journey, might through others be made embarrassing for him if he entered a car which the rules of the road and the customs, if not the laws of the country forbid his entering. On being urged by me, being anxious to converse with an American, he entered my car. We passed the time very agreeable together as the train whistled along by the palmy groves, green rice fields and numerous artificial lakes of Southern India. When night came on, as our native servants had prepared our beds for us, we both lay down to sleep. About three o'clock in the morning I awoke and hearing a sound of one moving in his berth, I inquired as I supposed of my native companion, the judge of Her Majesty the Princess of India's Court, how he had slept during the night. Imagine my surprise to hear in response the rather unpolished voice of a native of the Emerald Isle saying, "I think, sir, you are not aware of the fact that intruder who was in this car was ordered out several hours ago to make room for me, one of the employes of Her Majesty's Civil Service." Of course I subsided. The learned Judge of a Court had been rudely ejected from the coach in which he had been resting in accordance with my request, to make way for a fellow who had no higher position than a section boss in the construction of a government railway. But on meeting with the Judge the next day and tendering my earnest apologies and regrets, I was assured that he felt not the least humiliated or chagrined. He flattered me by the statement that meeting an American was such a rare thing in his country, that he had been fully repaid for his humiliation by his conversation with me during the previous day, when we had discoursed together of the two greatest antipodean peoples of the world—America the young nation of modern growth, advancement and civilization, and India the parent of the world's learning, civilization and art, and whose great teachers have been the founders of the religions of mankind.

EXPERT TESTIMONY.

By John E. Clark, M. D., Professor of Chemistry and Toxicology, Detroit College of Medicine.

The most crying evil at the present time in Forensic medicine and one which is of interest to both professions is the matter of expert testimony. The rights of litigants demand that the most serious attention be given to a full and free consideration of the unwarranted abuses which have insensibly crept into courts of law through the general laxity prevailing in these matters. The professions owe it to themselves and the public that every exertion be used to modify, or change completely the present methods. The trend of medical opinion at the present day is undoubtedly in favor of a revolution which will effectually bar unqualified or illiterate practitioners from posing in the guise of scientists. The knowledge possessed by the expert which particularly fits him for that function, is often too lightly regarded, and the ignorance which causes "Fools to rush in where angels fear to tread" frequently is accorded by juries, the consideration due only competent experts.

There are but few matters calling for expert testimony which can be scientifically handled by the ordinary practitioner; and by the ordinary practitioner I mean the man who has a general practice, and who, while versatile and competent as a physician per se, has not, and can not be expected to have that technical knowledge which is often demanded in special cases in courts of law.

The collateral sciences at the present time are being so radidly widened that it is a physical and mental impossibility for any one practitioner, though he be a genius, to keep abreast with the most recent developments of the various branches of scientific medical research.

Our laws as at present constituted, permit both parties alike to examine experts, ostensibly for the enlightenment of the court and jury. Over zealous attorneys frequently subpoena experts because of the opinion they entertain, rather than the knowledge they pos-

sess. It is to be feared that too often testimony is the result of a contempt prior to examination than a conclusion arrived at after a critical and careful study of the question, and this preconceived opinion is apt to weigh materially in the minds of those not specially qualified to give the subject the advantage of trained consideration. Under these circumstances it is to be expected that the testimony will be in behalf of those who pay for it. Often the court and jury are at sea, as much after, as before such testimony, and we have the humiliating spectacle frequently presented of pseudo experts disagreeing upon the commonest principals of medical science, the ends of justice defeated, and reproach cast upon the profession.

Bishop Whalen sapiently remarks that contempt prior to examination, however comfortable to the mind that entertains it, and however natural to great parts, is extremely dangerous, and more apt than almost anything else, to produce erroneous judgments both of persons and opinions. It would almost seem as if the bishop had in mind while penning these words, the mental condition of the typical medico-legal expert of the day, for it can not be denied that far too many so called experts, in giving their testimony tend to confirm the verdict that contempt prior to examination "is extremely dangerous." A justification of this fact is not impossible, bearing in mind the liberty accorded the ordinary practitioner by the courts of law, so long as no restrictions are placed upon expert evidence, and so long as the attainments of the experts are looked upon by courts and juries as merely secondary to personal opinions. The legal practitioner is not to be condemned for taking advantage of the laxity of the law in the interest of his client.

The rapid advance of science in its various branches necessitates the most careful consideration, and the most scrupulous care on the part of the competent expert. The lapse of even one year renders numerous additions and illustrations necessary. In no instance is this more clearly demonstrated than in the science of Toxicology and mental derangement. Resent researches have demonstrated that the old time expert toxicologist, though fully up to all the most rigid requirements of his day, would be lamentably in error at the present date. There is no doubt but that intelligent, conscientious witnesses of a few years ago have given evidence, which in the light of subsequent discoveries, has been shown to be erroneous especially in the matter of death by poison. The facility with which the trained legal expert can render abortive anything but the most careful and thorough chemical analysis of the present day, is not a reflection upon

toxicology, but rather a tribute to the scientific investigator. Less than half a century ago the separation of vegetable poison from organic materials, such as portions of the body, contents of the stomach, etc., was on a basis which seemed incontrovertible, but modern investigations have shown that the principles endorsed by the old time chemist were open to serious objection. Strychnia, morphia and other poisonous alkaloids were systematically eliminated and certain tests were applied, proving conclusively, to them, the presence of a given poison. Brieger, and others, however, have shown within the last two decades that sources of serious error were entirely overlooked by the old time toxicologist who based his conclusions upon his methods, and they have succeeded in eliminating from the same organic mixtures known not to contain these alkaloids, substances almost identical in their re-action with agents formerly supposed to indicate only poisons; in other words they discovered that the human body, both in life and after death, generates certain substances called ptomains which in their re-action produce phenomena similar to those formerly ascribed solely to vegetable poisons. Not only do these ptomains resemble in their chemical properties and re-actions the poisonous alkaloids, but many of them cause death with symptoms paralleling alkaloids when injected into the living body of an animal, so that irritant, narcotic, and neurotic symptoms of the vegetable poisons, may be produced by poisons generated in the body. The distinction between the poison from within and that introduced from without, is one that none but the trained expert should attempt to differentiate. Not only is this necessary to insure the conviction of the guilty, but much more to prevent the condemnation of the innocent, the security of society, and the preservation of the administration of justice.

An illustration of the danger of an unqualified practitioner attempting to pose as an expert, occured recently in one of our own Detroit courts in a case of a young woman confined for some time under the supposition that she was guilty of the administration of morphine with homicidal intent. An infant was found suffering with symptoms simulating morphine poisoning, and shortly after the arrival of the physician, who administered some medicines, expired. The coroners inquest involved testimony as to the chemical examination of the contents of the stomach, and upon the testimony of the expert the girl was committed to the county jail some seven months. Afterwards the case came to trial in the Recorder's Court, and on subjecting the expert to a rigid cross-examination by a com-

petent attorney, the prosecution completely broke down and the accused was liberated. No remuneration was or could be accorded the unfortunate for the disgrace and suffering entailed.

To particularize: the original conviction was secured on testimony which went to show the presence of morphine in the contents of the stomach. The verdict was secured as a result of a statement by the medical witness that he found morphine present, being his opinion on one of the most unscientific tests known to chemists. The defendant was in the hands of an attorney as ill fitted to defend his client as the expert was to condemn her. The result was a verdict which bound her over to the Recorder's Court. Certain evidence in the meantime came to light which threw a decided doubt on the guilt of the defendant and the case fell into the hands of an attorney who prepared himself for a rigid cross-examination of the prosecuting witness, and from him drew the admission that the test upon which he based his hypothesis of the presence of morphine was not followed by any corroborative tests. It also transpired, during the examination, that the test which confirmed the expert in his opinion was a color test, produced by the action of a re-agent, and that the expert was ignorant of the fact that many other substances aside from morphine would give the same color when this test was applied; and that a piece of sausage which was proven that the child had eaten before death contained the very material which might be eluminated, and give results identical with morphine. Besides it was shown that the doctor himself, strange to say, had injected into the body a drug which when treated with the re-agent referred to, produced exactly the same color as that produced by morphine; the result being as a matter of course, the utter failure of the prosecution with no blame to them, but with an inevitable stigma attached to expert testimony in general.

Another illustration of but recent date shows the result of a lack of keen perception on the part of the expert. The defendant was bound over to the Recorder's Court under an accusation of an attempt to poison, it having been clearly proven that a certain amount of liquor containing poison had been administered. The defense admitted the administration of the poison but for the purposes other than homicide, and the question turned upon the amount of poison administered. With the aid of the expert the prosecution made out a clear case of the guilt of the defense. The amount of liquid administered was proven, also the fact that whatever poison was administered was given in a clear solution. The defense secured

the acquittal of the prisoner on demonstrating beyond question the impossibility of a poisonous dose being held in solution in the liquid taken; in fact it was shown that the amount claimed by the expert to be in the solution was about ten times more than could possibly be dissolved in the menstruum. The result was an acquital, and an undeserved reflection upon expert testimony.

The pretentious uncertainty of testimony which turns upon evidence given by expert witnesses in many cases seems to me should arouse the attention of our courts to the magnitude of the evil, so that at least some of the more objectionable elements of our medical jurisprudence might be removed, and that with the most friendly feeling for both professions it is wise to criticise severely and to censure necessarily, not the individuals, but the system which makes such reproach to the courts, lawyers and medical profession possible. I think that both professions should unite in securing as far as possible trustworthy expert testimony by some method similar, if not identical, with that adopted in foreign countries so that we might avoid the reflection of the haphazzard trials of the past, and secure evidence as trustworthy and as certain and straight forward as that in any other class of cases brought before the courts.

Maudsley, one of our ablest medico forensic writers, states: "It is notorious that the acquital or conviction of a prisoner where insanity is alleged, is a matter of chance. Were the issue to be decided by tossing up a shilling, instead of by the grave procedure of a trial in court, it could hardly be more uncertain. The less insane person sometimes escapes, while the more insane person is sometimes hanged. One man laboring under a particular form of derangment is acquitted at one trial, while another having an exactly similar form of derangment, is convicted at another trial. Taylor makes the statement that acquital on the plea of insanity is on some occasions a mere matter of accident. Apart from these trials Buckham justly observes that our judicial decisions give general satisfaction, and are received with confidence by the people. The probity and ability of our judges have rarely been challenged. The ability of the bar of this country is unquestioned, and from no people can more intelligent and trustworthy jurors be drawn than from American citizens. Possessing such advantages in the way of eminent lawyers and intelligent jurors, elements of eminently reliable courts, why is it that verdicts in so large a class of cases are not at all to be depended upon—are so uncertain that they command neither the respect nor confidence of the people, and are therefore shorn of the moral force

and influence that properly appertains to judgments of courts.

That such uncertainty of verdict exists, or is possible, postulates some grave error or defect in the judicial proceedings and consequently the interests of society, of judiciary, and of all persons connected with insanity, trials demand searching investigation, to discover if possible the cause or causes, the persons or classes responsible for the miscarriage of justice and to devise such remedies as properly applied, will insure reasonable certainty of true verdicts in all insanity cases. "A consumation devoutly to be wished," which, if obtained, would render life and liberty more secure and erase the foul blot that mars the otherwise fair record of our judicial proceedings.

This matter of Medical Expert Testimony in criminal prosecutions, has commanded much attention recently, in both our own and foreign countries. The favored remedy just now appears to be, says the journal of the American Medical Association, that embodied in the different legislative proposals that have been put before the law makers of the three states, New York, Illinois and Minnesota, viz.: the appointment of a commission of experts by the judge or judges, either in each particular case or for a given period for all cases, with a provision of the law, that no one shall be considered an expert and have his testimony received as such, unless he can show he has had actual experience in, and has devoted a certain number of years to the study of the subjects in which he claims to be especially skilled.

A bill designed to meet and remedy existing difficulties in cases of insanity, was presented to the Pennsylvania legislature, but failed for "want of time." In this bill the design was to ascertain by a medical commission and to report to the court an unbiased statement of the facts relative to the claimants' physical condition, leaving prognostic and other opinions aside. It provided first, that in any suit where the question of the mental capacity or the physical condition of, or extent, character or effect of injuries sustained by any person or persons may be in controversy, the court in which such suit is pending shall, upon the application of either of the parties to such suit, appoint one or more medical experts, who shall, after being duly sworn, or affirmed to discharge their duty with fidelity, and after notice to the parties, make full examination of such person or persons and make a report, thereon, in writing to the court, which report shall be filed with the record of the suit and may, so far as relevant, be read as evidence at the trial, subject to the right of either party to call such medical expert or experts for examination in

chief or for cross-examination.

Second :—That if any such person or persons shall refuse to submit to examination by such expert or experts, the court shall make such order where the refusing person is a plaintiff for the entering of a non suit.

The Denver Medico-Legal Society through a committee, appointed to consider the subject, have also formulated demands for reform, but reform in the methods of using medical men as experts is "a plant of slow growth." Suggestions and recommendations are offered in sufficient number and there the matter ends. English and American courts continue to follow traditional usages and show little willingness to find a better way. Each of the parties to a suit in litigation, secures the services of medical witnesses favorable to him and leaves the witnesses to justify their testimony as well as they can. This is in accordance with the theoretical right of either person to call, on behalf of his defense, such witnesses as he sees fit. Judge Cullem discussing this subject before a Brooklyn medical society, declared that it is useless to hope for any legislation which will limit the character of the expert witnesses to those who may be named by the court or picked out by any society; but this is precisely what medical men continue to hope for and ask for.

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NOTES.

Why some things are as they are, is worrying the writer, and he will express his ideas in the hope that some one will treasure up his suggestions and put them into legislation in Lansing at the coming session. Why do lawyers tolerate in the Union Trust Company the power to act as executor and administrator in estates of deceased persons, when this business could as well be done by themselves as a class? There is no saving to the estates by reason of a corporation acting as administrator or executor, far from it, for they charge as has been seen in several recent estates, very large amounts for their services. They do a large share of this very lucrative work, and that too in a large measure through clerks. It is done no better than a lawyer would do it, and at a greater expense to the estate than the lawyer would occasion.

The lawyers ought to have some power to affect legislation, and they should use this power to effect a change in this particular.

Why should this work done largely through clerks, go into the coffers of the wealthy individuals, represented in the ownership of Trust Company stock, rather than into the pockets of the lawyers, who in the stagnation and depression of business, are making many of them not too good a living.

The statute of garnishment permits only plaintiffs who have obtained judgments, to seek this remedy as against defendants, and makes no provision for defendants who have obtained in the circuit court judgment against the plaintiff from pursuing the same course as against plaintiffs.

The rate of interest is fixed by statute at six per cent., and yet

the law is nominally different under the statute for interest on judgments, those drawing seven per cent. Why are these things so?

The recorder's court of Detroit recently held the street opening law, passed at the last session of our State legislature as unconstitutional. The law was designed to take the place of and supersede in Detroit the operation of the general State law, under which all street opening proceedings had for a long time been conducted. The law in brief after providing for a few minor changes in the court practice, permits the jury to decide what portion not less than one-half of their award shall be spread on a local assessment district previously fixed by the common council, and recited in the petition filed in court and the verdict rendered thereon.

The motion to quash was based on two points. First, that the jury under the statute is practically required to fix the amount to be spread on the city at large in which they are property owners and tax payers. They are therefore prejudiced, incompetent and unable to try the cause without bias. Second, that the jury are a branch of the judiciary and the delegation to them of the power to fix the amount to be assessed on a local district, is a delegation of functions belonging to the legislative branch of government and hence invalid under constitutions such as ours, which divide the powers of government into three co-ordinate branches.

The first point would seem hardly worthy of consideration as the interest is so vague, so indefinate, and each one's portion of the expense to be borne so very insignificant, that the saving of the amount to the individuals of any jury would weigh very little as against justice to an individual or set of individuals.

The second point deserves more attention and the judge found in this point grounds for declaring the law unconstitutional. The action of the judge requires the city to prosecute an appeal if the law is to be upheld, and meanwhile no further cases can be tried.

This law may prove as the learned judge has declared it to be, unconstitutional and other objections, some of them with fair chances of defeating particular sections of the law might be cited, but in many particulars if this law fails in its operation, one of the fairest of condemnation laws we have ever had will fall.

Our articles of this month ought to please the bar of this State, who will find in that of Mr. Grece statements of the standing of the bench and bar of the far East, and in that of Dr. Clark suggestions for improvements in the practice of this part of the West.

Mr. Grece spent several months in India and Ceylon, and during that time was often present in the law courts of those countries. His experiences there make his article on their courts very interesting.

It is hoped that in a future number an account of his other experiences will be presented to our readers.

Dr. Clark so well known to our Detroit readers in his positions of member and president of the Board of Education; in his capacity as expert in important cases for several of our leading lawyers, and as a thoroughly scientific careful investigator in various departments of knowledge, is here presented as a writer on a subject bordering on his special work. His suggestions come from experience and knowledge, and our legislators seeking to remedy existing evils can gain ideas on which valuable remedial legislation may be built.

LEGAL MISCELLANY.

The decision by the supreme court of Illinois which points out a fatal defect of the so-called Torrens land-title act has caused no surprise among lawyers. The fatal defect is found in the legislative attempt to confer judicial power on the ministerial officer called registrar of titles and his "examiners of titles." In a country where the judicial power is, by a written organic law, vested exclusively in the judicial organs of the constitution, such transfer of any part of it to a not judicial officer can not be made. This is the point of the court's decision overruling the contention—which two lower courts had upheld—that the powers conferred on the registrar and his examiners were not judicial but ministerial. The point is stated by the court in these words:

"It seems to us that it would be difficult to more clearly and positively confer judicial powers upon a person unqualified under the constitution to exercise those powers done by this act. This, doubtless, resulted from an attempt to adopt the provisions of a similar enactment in force in Australia, Canada, England, and perhaps other countries, by which the certificate of title issued becomes conclusive as to the ownership of the property, and in which countries no constitutional or other restriction exists against the legislative grant of such powers upon non-judicial officers."

This language of the court suggests the legislative remedy that is necessary to give validity to the essential features of this most important statute. The judicial power which the act attempts to confer on the mentioned functionaries can be exercised only by the courts. Probably it will be found that this may be done in most cases by some special and inexpensive mode of procedure in chancery. However this may be, it is made plain by this decision that land titles can not be judicially determined in this country for the purpose of registration under the "Torrens law" by any board of examiners or other extra-judicial functionary.—*The Legal Adviser.*

Incidental reference was made in the leading article in our issue of last week on the subject of "Bicycles as Baggage," to a very recent case before Judge Russell of the Circuit Court of the City of St. Louis, involving the question discussed in the article. In view of the fact that this seems to be the first case in the courts on the subject, it may

be of interest to notice it at more length. The style of the case is *State ex rel. Bettis* v. *Mo. Pac. Ry. Co.* It was brought to compel defendant to carry relator's bicycle as baggage, upon one of its suburban trains, the relator taking passage thereon and carrying his bicycle for the purpose of recreation, pleasure and locomotion. Defendant refused to carry same unless paid a compensation in addition to the regular fare. In addition to the main question involved, the railroad company contended that the remedy of *mandamus* will not lie because there is an adequate remedy for damages growing out of the refusal to accept as baggage the plaintiff's bicycle. The court overruled this contention holding that it is settled beyond a doubt that a railroad corporation may be compelled by *mandamus* to exercise its duties of carriage of freight or passengers and the fact that the individual may have a remedy for damages sustained by neglect of duty does not preclude his remedy by *mandamus*. As to whether a bicycle is baggage the court substantially followed the authorities and argument as laid down in the article in our last issue, which was in effect a reproduction of the brief filed by relator's counsel. Judge Russell's conclusion was in line with modern authorities which define baggage as consisting of those things which the traveler takes with him for his own personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey. This rule, which may be considered as the settled law both in England and in this country, must, however, be taken with certain limitations. They should not exceed the limits of reason or custom. They should be for the convenience of the traveler and not for some other party and they must not be carried for the purpose of sale. That a bicycle, offered for transportation under the circumstances of this case, is baggage, was quite clear to the court, it appearing from the petition that the bicycle is a machine or vehicle in very common use among a large class of people, for health, recreation and locomotion; that the relator belongs to this class which is usually denominated wheelmen or bicycle riders and that it is the use or custom for relator and for wheelmen generally to make trips on railroads taking their bicycles with them for the purpose of using them at the end of their journey for health, recreation or locomotion. It also appearing that the relator had no baggage but his bicycle and that it was within the statutory limit as to weight, the court said that "there can be no escape from the conclusion that the relator's bicycle is baggage, as defined by the authorities set out, and that the respondent is bound to carry it as such without extra compensation therefor."

The conclusion of Judge Russell is undoubtedly correct and in accord with the best modern authorities. Nothing appears in this case involving the question as to the power of the railroad company to make rules governing the carriage of such vehicles as baggage. For instance, a question might arise as to the validity and force of a

rule, adopted by the carrier, requiring bicycles offered as baggage to be boxed or crated. Such a rule, as applied to ordinary baggage, is constantly enforced, and as applied to bicycles would seem to be reasonable and valid. If so, much of the force and practical value of decisions like that of Judge Russell will be lost.—*Central Law Journal.*

A very peculiar case has recently been decided by the New York Court of Appeals. The case is entitled *Picksley* v. *Starr, 149 N. Y., 432 (32 L. R. A., 703)*. An action was brought to recover a balance alleged to be due from the defendant to the plaintiff, pursuant to an agreement with respect to compensation for plaintiff's services while in the employment of the defendant. For a number of years the defendant had been in the habit of giving to the plaintiff $2,500 as a Christmas present as evidence of and in recognition of plaintiff's peculiarly valuable service to the defendant. In April, 1889, arrangements were made between plaintiff and defendant by which plaintiff's salary was increased to $9,000, and in addition thereto he was to receive a commission for the year of 1 1–2 per cent. upon the amount defendant's sales in excess of $600,000. On Christmas Eve, 1889, the defendant handed the plaintiff a check for $2,500, as was his custom. In a day or two after the plaintiff expressed to the defendant on behalf of himself and wife his thanks for the gift. The defendant remarked that he "was very glad they were pleased." A few days later defendant's attention was called to the check by his bookkeeper, and was directed to charge the amout to plaintiff's account. Nothing was said to the plaintiff about the check until May following, when it was included in an account rendered to plaintiff, at which time defendant was in Europe. In the fall of the same year plaintiff spoke to the defendant about the check, saying he had every reason to suppose it was a gift, the defendant contending that the increased salary and commission were intended by him to take the place of the usual gift, but that in this instance he had forgotten about the arrangements made between them, and had followed the habit of previous years in making the gift. Defendant testified on the trial that a mistake had been made by him, and that he did not intend to give plaintiff the $2,500 in addition to the increased salary and the commission. The question involved in the case is whether there was a valid gift of the $2,500 to the plaintiff, or whether the gift was made under a mistake and invalid, and could be offset against the demand of the plaintiff for balance due him on account. The plaintiff contends that the intent in the mind of the defendant was clearly proven. *Bedell* v. *Carll, 33 N. Y., 581; Beaver* v. *Beaver, 117 N. Y., 421, 6 L. R. A., 403.* The delivery of the $2,500 was complete and amply proven. *Harris* v. *Clark, 3 N. Y., 113, 51 Am. Deg., 352. Mandeville* v. *Welch, 18 U. S., 5 Wheat, 277.* Gray, J., delivering the opinion, says, in part: "This is not like the case

where parties come to some agreement in the belief that certain state of facts exist, and money is paid by one to the other in consequence thereof, and it subsequently appears that there was a mistake with regard to the facts. Money when so paid is deemed to have been received by the one to whom it is paid to the use of one paying it. The mutual error, which affected the agreement between the parties, requires that they should be remitted to their original rights. In such a case, in equity and in justice the money does not belong to the party receiving it. A gift, however, requires no consideration, and depends upon no agreement, but upon the voluntary act of the donor only, and is accomplished by a delivery of the subject of the gift. It would be a very harsh rule to lay down that a party receiving a gift under the circumstances of the present case might incur, to quote the language in *Haviland* v. *Willets, 141 N. Y., p. 52:* 'An unknown and unsuspected obligation, if required to return the fund.'"

The decision, in effect, says that one who delivers a Christmas gift in the shape of a check to an employee, according to habit formed of previous years, though made by mistake, forgetfulness of the fact that employee's salary had been increased, and such gift is charged to employee's account a few days later without notice to him of that fact for several months thereafter, the donor cannot avoid such gift on the ground of mistake.—*The American Lawyer.*

An interesting case somewhat novel in its features was last week tried in the U. S. Circuit Court S. D. O. W. D. before Hammond J., there being no authority except perhaps the case of *Risher* v. *Meehan, 11 Circuit Court Rep. 403*, decided by the Circuit Court of Columbiana County in this State and, saving a few spare instances, little modern authority in any state.

The case was that of Nannie Hughey, administratrix of William Hughey, deceased, against Dennis Sullivan, a police officer of Cincinnati, and was an action for damages brought under the general provisions of sections 6134-6135, Rev. Stat. of Ohio, for having wrongfully and negligently caused the death of William Hughey, a boy seventeen years of age, who at the time of his death resided with his parents in Newport, Ky.

In brief the facts were these: On the evening of October 22nd., 1895, the deceased, together with several other boys, was standing in front of a shoe store on East Pearl Street, immediately opposite the Market House, Cincinnati. The street is made up entirely of business stores, the Market House being in the center and stores on each side. A passer-by observing the boys, reported the fact to the defendant officer, claiming that they were acting suspiciously. Walking through the Market House, the officer stationed himself between two stalls at a point immediately opposite where the boys were standing, when, as claimed, he saw the boys tugging something

under their coats, having apparently pulled from a string a pair of shoes that were suspended from an awning pole in front of a shoe store. Thereupon the defendant officer rushed out from the Market House and crossed the street. The boys, warned of the officer's approach, immediately ran in opposite directions. The officer gave chase and pursued deceased, calling to him while running, to "Stop!". The boy, however, kept on running until he reached the corner of Pearl Street, and then turned south on Sycamore Street, the officer being in close pursuit. As soon as the boy turned the corner, the officer drew his revolver and fired four shots, the last of which took effect, striking the deceased in the foot. The boy fell to the ground and was immediately taken to the hospital, where the wound was dressed and all the proper attention given it. Two days later lock jaw set in, and lingering several days, the boy died in convulsions.

On behalf of the defense it was claimed that the shooting was purely accidental; that the officer did not intend to shoot or kill the boy, and that his only purpose was to frighten him and at the same time to signal his fellow officers to aid in the pursuit. The officer testified that he fired the first shot in the air and the remaining three immediately toward the ground. This latter fact, however, was put in issue, being controverted by other witnesses who claimed that the last three were fired in an angular direction calculated to hit the boy.

Under these facts the court charged the jury that an officer had no right to shoot or kill an offender flying from arrest for the commission of a mere misdemeanor; that the law regarded it better that the person escape altogether rather than that his life be taken to apprehend his flight; that, therefore, in as much as the alleged offense of the deceased if at all committed, was a mere misdemeanor, it was no defense or excuse, if the defendant actually intended to shoot or kill the deceased, and in such event he would be liable, and must respond to the plaintiff in damages accordingly. On the other hand, if the jury found that the defendant did not actually intend to shoot or kill the deceased and that his purpose was as claimed, to merely frighten the boy and signal his fellow officers to aid him in the pursuit, the jury would then consider, whether or not under the circumstances, the defendant was guilty of negligence; that having no right to shoot or kill the deceased in order to prevent his escape, he owed him the same duty, and should refrain from jeopardizing or taking his life, as to any other individual. Therefore, in such events, it was for the jury to say whether the shooting of a revolver in a crowded street to frighten another or to signal to his fellow officers to aid and assist in the arrest of a person whose life they had no right to take, was such conduct as should be expected from a man exercising ordinary care and prudence. If they found that the defendant did not exercise such care as should be expected of a man of ordinary prudence, and that the shooting of a revolver under the

circumstances stated, was negligence, then, and in such event, the defendant was equally liable as though he actually intended to shoot or kill the deceased.

The court having completed its charge, the jury retired for its verdict, and after deliberating for twenty-four hours rendered a verdict for the plaintiff, and assessed the damages at $100. A motion was immediately made on behalf of the plaintiff for a new trial, which the court ordered at once, calling upon the defendant to show cause why the verdict should not be set aside as being inadequate. At the close of the argument, the court, stating that if the life of a person was worth a hundred dollars it was worth a good deal more, found the verdict insufficient and inadequate, granted a motion, set aside the verdict and ordered a new trial.—*Weekly Law Bulletin.*

BOOK REVIEWS.

AMERICAN DIGEST (Annual for 1896) of all the decisions of all the United States Courts, the Courts of Last Resort of all the States and Territories and many of the Intermediate Courts, from Sept. 1st, 1895 to August 31st, 1896, 6343 pp. Published by West Publishing Co., St. Paul, Minn.

The American Digest covers a broader field and gives the reports of more cases in a better manner and more promptly than any other Digest offered to the law profession. The enterprise and promptness shown by the publishers of this volume, places in the hands of lawyers the very latest cases and in such a form and with such precision, that makes it indispensible to the practicing lawyer.

REVISED RULES OF PRACTICE IN THE COURTS OF MICHIGAN, as adopted October 8th, 1896, to take effect January 1st, 1897, with an Appendix containing the Special Rules in the different Counties etc., with notes by FREDERICK W. STEVENS. 292 pp. Callaghan and Company, Chicago. Price $3.50 net.

A necessity has long been felt that an entire revision should be made of the Rules of Practice of the Courts of this State. Many of the old rules had become obsolete and many more were useless under the revised statutes of the State, and some were confusing and harmful.

Under the constitution and laws of this State the Supreme Court is required to establish, modify and amend the practice in the courts and simplify them. It therefore became the duty of that court to put the Rules of Practice in a proper form, so that the court might proceed according to the latest statutes and the simplest effective manner. With this in view the Supreme Court has adopted the Revised Rules, and by a careful inspection of them, it will be found that the revision has been made in a most thorough and satisfactory manner. The old rules are consolidated and made plain, and new rules have been made to cover extraordinary remedies, such as mandamus and quo warranto. Of course some complications will arrise from the changes that have been made, but those will soon be cleared away and a better practice will grow up under the new rules.

The notes on the rules are principally based on Michigan cases and will prove helpful in adopting the rules to the new practice. As every Michigan lawyer must have the rules, it is not necessary to call attention to the various changes that have been made.

CURRENT LITERATURE.

The *Review of Reviews* for November is in the usual style of this excellent periodical. Methods and Tactics of the Campaign, by W. B. Shaw, the editor department Progress of the World, George Du Maurier; a character sketch by Ernest Knauft, editor of the "Art Student;" and the usual departments make up a number which in point of real interest joined with instruction, makes up a magazine hard to equal at even greater cost.

Public Opinion has kept its promise as to its scope during the campaign. It has most excellently carried out its intention to present a brief view of the current history, especially in the field of American Politics.

The newly adopted scheme of *Littell's Living Age*, to furnish a monthly supplement to its weekly edition, is now in operation. By its use there will be added many pages to the number heretofore given as a year's subscription, and by its use to insert and print translations of late stories from French, German and other periodicals, there will be created a further demand for this already widely appreciated magazine.

Appleton's Popular Science Monthly for November contains several very interesting articles. Among those of especial interest to lawyers, from the fact that it deals with problems of individuality, is that of Double Personality, by Prof. William Romaine Newbold. In October there was an article along the same line from the same writer. Both were excellent. Popular Superstitions is a very clever collection of unreasoning beliefs prevalent in different countries.

The *Atlantic Monthly* for November contains a number of very interesting articles. Causes of Agricultural Unrest, by J. Laurence Laughlin, is the leading article. They announce also that during the coming year they will publish a series of articles on problems of present interest,—articles that are as timely and as thorough as the most eminent authorities can prepare. Among them will be such subjects as the following: "The Social Results of Liquor Laws," by President Charles W. Eliot, setting forth the results of the original investigations made by the Committee of Fifty,—the most remarkable sociological investigation ever undertaken in the United States; "The Social and Economic Results of Modern Suburban Transportation," by Professor Arthur T. Hadley, of Yale University; "The Fallacy of the Present Unrest: Are the Poor becoming Poorer?"—showing the extraordinary fallacy that lurks in the assumption of increasing poverty in the United States; "The Necessary Changes in our Banking System;" and other subjects, taken up, of course, when they are under discussion or are thrust into prominence by events.

"The Effect of Republican Victory" is most ably and pithily discussed by the Hon. T. C. Platt, in the opening article of the *North American Review* for November. A scholarly essay on the "Influence of the College in American Life," is contributed by President Charles F. Thwing, D. D., of the Western Reserve University and Adelbert College. President Thwing asserts, among other things, that while the American college finds its best conditions in a Democratic community, the college in turn tends to develop democracy in the community.

The immense advancement in the past thirty years in agricultural science renders worthy of widespread attention the article, "What the Country is Doing for the Farmer," by W. S. Harwood. Mr. Harwood was born in Charles City, Iowa, and is a graduate of the university of his native State. In 1883 he began journalistic work in Chicago, removing some three years later to St. Paul, in which city and in Minneapolis he devotes the greater part of his time to literary labor.

The Right Rev. William Croswell Doane, Bishop of Albany, treats in terse style of "Some Later Aspects of Woman Suffrage."

"What is the Justification of Martial Law?" is very thoughtfully inquired into by G. Norman Lieber, U. S. Judge-Advocate-General.

An interesting paper on election trials in Great Britain, by Right Hon. Sir Charles Dilke, M. P., treats of the workings of the Corrupt Practice Act, and is very interesting to lawyers.

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A BRIEF OUTLINE OF THE LIFE AND WORKS OF JUDGE COOLEY.

GEORGE A. KATZENBERGER.

The following sketch of the life of the man whom we all delight to honor, is neither a biography nor review, and makes no pretentions to literary merit. It is rather an effort to compress into the fewest words an outline of a busy life.

Thomas McIntyre Cooley was born at Attica, N. Y., January 6, 1824. His father, Thomas Cooley, was a Massachusetts farmer of the Puritan blood who settled in Attica with a large family in 1804, having invested his limited means in one hundred acres of wild timber land which he brought under cultivation with the help of his family.

The subject of this notice secured for himself a fair academic education, taught school for three terms, and having decided to study the law, began in the office of Theron R. Strong of Palmyra, N. Y., who afterwards became one of the judges of the supreme court of that state.

In 1843 he removed to Adrian, Mich., where he continued his legal studies in a private law office until 1846, when he was admitted to the bar. In the meantime he had held the office of deputy county clerk and register in chancery, performing practically all the official duties of his principal, and for a while he was editor of the "Watchtower".

"History of Michigan" as one of the American Commonwealth series begun by Houghton, Mifflin & Co. He further wrote an Introduction to "The American Railway" in 1887.

Inasmuch as Judge Cooley has not preserved all of his published papers and addresses, the following list is necessarily imperfect:

1. The Judicial Functions of Surveyors, 1852.

2. What the Law can do for the Health of the People. An address at a State Sanitary Convention.

3. Some Checks and Balances in Government, *International Review*, May and June, 1876.

4. The Cases in which the Master is Liable for Injuries, *Southern Law Review*, 1876.

5. Liability of Public Officers to Private Actions for Neglect of duty, *Southern Law Review*, 1887. (This paper opens with a sentence since widely quoted, "A public office is a public trust.")

6. Limits to State Control of Private Business, *Princeton Review*, March, 1878.

7. Changes in the Balance of Governmental Powers. Address to the Law Students of the University of Michigan, 1878.

8. The Surrender of Fugitives from Justice, *Princeton Review*, January, 1879.

9. The Recording Laws of the United States, their Inadequacy and their Danger. Address before the American Bar Association, 1881.

10. Presidential Inability, *North American Review*, Nov., 1881.

11. State Regulation of Corporate Profits, *North American Review*, September, 1883.

12. The Abnegation of Self Government, *Princeton Review*, November, 1883.

13. Law as an Educating Force. Address at the Law Commencement, University of Michigan, 1884.

14. What shall be done with our Ex-Presidents? Contribution to a Symposium, *The Century*, December, 1885.

15. Codification, *American Law Review*, May and June, 1886.

16. The Semi-Centennial of Michigan. Address delivered at the celebration of the State Semi-Centennial, 1886.

17. Arbitration in Labor Disputes, *The Forum*, June, 1886.

18. The influence of Habits of Thought upon our Institutions. Address before the South Carolina Bar Association, 1886.

19. The Acquisition of Louisiana. Address before the Indiana Historical Society, 1887.

20. The Uncertainty of the Law. Address before the Georgia Bar Association, 1887.

21. The Interstate Commerce Law: Its Operation and Results. Address before the Commercial Club of Boston, 1888.

22. On the Promulgation of the Constitution of Japan. Address at Johns Hopkins University, 1889.

23. Comparative Merits of Written and Prescriptive Constitutions. Address before the New York Bar Association, 1889. Printed in *Harvard Law Review*, March, 1889.

24. The Place of the Federal Supreme Court in the American Constitutional System. Address before the Political Science Association of the University of Michigan, 1889.

25. Methods of Appointing Presidential Electors, MICHIGAN LAW JOURNAL, Vol. I, No. 1, February, 1892.

26. Federal Taxation of Lotteries, *Atlantic Monthly*, April, '92.

27. Sovereignty in the United States, being a lecture delivered in a course on "Rights" to a class of Postgraduates in the Law Department of the University of Michigan. Printed in MICHIGAN LAW JOURNAL, April, 1892.

28. State Bank Issues in Michigan. Publication of the Michigan Political Science Association, No. I, May, 1893.

29. Federal Taxation of State Bank Issues, *Idem*.

30. The Power to amend the Federal Constitution. MICHIGAN LAW JOURNAL, April, 1893.

31. Grave Obstacles to Hawaiian Annexation, *The Forum*, April, 1893.

32. The President's Power to enforce Federal Laws. Letter to the President, 1893.

33. The Administration of Justice in the United States in Civil Cases. Address before the World's Fair Congress Auxiliary. Also in MICHIGAN LAW JOURNAL, September, 1893.

34. What the Senate should do to break the Deadlock over the repeal of the Sherman Bill, *N. Y. Evening Post*, October, 1893.

35. The Influence of Thought upon our Institutions. Rewritten and read at Ann Arbor, November 13, 1893.

36. Independence of the Legislative Department of Government. Argument before the Supreme Court of Michigan, 1893.

37. The Fundamentals of American Liberty, MICHIGAN LAW JOURNAL, June, 1894.

38. The Lawyer as a Teacher and a Leader, being a portion of the President's address read before the American Bar Association,

at the 17th annual meeting at Saratoga Springs, August 22, 1894. Printed in MICHIGAN LAW JOURNAL, September, 1894 and in *American Law Review*, Sept.-Oct. 1894.

39. An address on Compulsory Arbitration, at Ann Arbor, Nov. 17, 1894.

40. The Founding of the Law Department of the University of Michigan. To Wit: Senior Law Class Annual, 1894.

41. Nullification. An address in University Hall, Ann Arbor, April 24, 1895.

42. The Webster-Hayne Debate. Res Gestae, Senior Law Class Annual, 1895.

43. A Lawyer's Obligations to the Public, *American Magazine of Civics*, November, 1895.

44. Biographical Sketch of Judge Campbell. Res Gestae, 1896.

The labors of Judge Cooley in law schools have by no means been limited to the University of Michigan. He delivered two full courses of lectures on the law of Municipal Government and the evils connected therewith, to the students in Johns Hopkins University in the years 1878 and 1879, and a course of lectures on the Interstate Commerce Law in Yale University during the latter year. Also at different times lectures on different phases of legal-political institutions in Johns Hopkins University that have never been published, spending considerable time in the City of Baltimore and watching the development of that institution in which he was much interested.

He was President of the American Bar Association in the year 1893–94, and wrote the usual annual address directing his attention mainly to peculiar features of legal development going on at that time. His health at this time had become so bad that he was unable to be present at the annual meeting, and his address was read by another.

While in conformity with the plan adopted at the beginning of this contribution, we will not enlarge upon those faculties of Judge Cooley which have endeared him to all who have been so fortunate as to meet and hear him, yet we can not, in conclusion, but quote from a biography of Judge Cooley contributed by President Angell in the *To Wit:*

"His simple, but pure and noble character left its impress on every student who was capable of being inspired by purity and noble ability. The elevating influence which he exerted upon the personal and professional life of thousands of students who were under his care cannot be measured."

DOGS.

H. M. MOWAT.

Although familiarity with the canon law is not indispensible in this province, everyone should know a few things about canine law. But whether these few observations on this practical subject would have been offered, were it not that the writer still bears four well-defined tooth marks received in the dog days recently passed is a matter of grave doubt. Not that the subject is unworthy, for the dog is "the friend of man," and particularly if the man happens to be a lawyer, for the number of reported actions at law, caused by these friends, is quite remarkable. Happily there is little reciprocity, for while numerous dog actions have come to the lawyer, but few lawyers can be said have gone to the dogs.

In 1886 an eminent Judge in deciding that a bequest to the "Home for Lost Dogs" was valid, as being to a "charity," said, "Of all domesticated animals, those for which men have the highest affection, and by which they are most served, are dogs" (*a*). After this compliment it is somewhat ungrateful of our friends to continue to so misbehave towards the gentle sheep (*assueti ad mordendum oves*) that the Legislature has felt bound to continue in force an insulting enactment, which implies that the latter animal is of more importance than a man. Because, under the Dog and Sheep Act (*b*) the owner of a sheep or lamb killed or injured by any dog shall be entitled to recover, whether the owner or keeper of such dog knew, or did not know, that it was vicious or accustomed to worry sheep, and without proof of the propensity to kill and worry (*c*), and a dog found pursuing sheep can be shot by any one. But if a man is bitten the dog's owner is not liable, unless the plaintiff can show *scientia*, by proving that the dog had, to the owner's knowledge, previously bitten some other man, or exhibited other viciousness towards mankind. Even where the owner knew that his dog had once nearly killed a goat, in the case, this summer of *Osborne* v. *Chocqueel* (*d*), a

a. Re Douglas, Obert v. Barrow, 55 L. T. N. S. 888 (1886.)
b. R. S. O. cap. 214, sec. 15.
c. Regina v. Perrin, 16 Ont. R. 446 (1888.)
d. L. R. (1896) 2 Q. B. 109.

Divisional Court, composed of Lord Russell of Killowen, C.J., and Wills, J., held that this knowledge was not sufficient to render him liable, because a dog might be amicably disposed towards men and yet ferocious to other animals. Although it is well known that the eminent presiding Judge, who has been so recently our visitor, takes a keen interest in horses, dogs and sport generally, yet he cannot be found leaning towards dog ownership, for he said that in his opinion the law was unsatisfactory, and that a man should be responsible for his dog; although he was not so much concerned in what the law ought to be as in saying what it was. This being the law, it means that a person who is injured by a dog receives no consideration in law, unless he puts himself in a position to show that some one else has also been injured — a thing that a stranger to the locality which is the home of the dog finds it most difficult to do. *Fleeming* v. *Orr* (*e*), in the House of Lords, is an authority for this doctrine. But in that case in the Scottish Court below, Lord Cockburn said, somewhat contemptuously, "The result of the argument would be that every dog is entitled to have at least one worry, and every bull one thrust without rendering his master responsible. It may be that such is the law of England, but it would rather appear that they have in that country an unbounded toleration for first offences."

Should the *scienter* doctrine with reference to dogs be abolished by statute, and dogs relegated from the class *mansuetae naturae* to that of *ferae naturae*, then the statement of the law by Lord Denman in *May* v. *Burdette* (*f*)—a pet monkey case—continues to be correct: "The conclusion to be drawn from an examination of the authorities appears to us to be this: that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it at his peril, and that if it does damage, negligence is presumed without express averment. The negligence is in keeping such an animal after notice." This is in line with *Fletcher* v. *Rylands* (*g*). In the Toronto bear case, *Shaw* v. *McCleary* (*h*), these were followed, and both husband, owner of the marauding animal, and wife, owner of the premises where it was kept, were held liable for injury to the person attacked. So, also, recently in our own Supreme Court in *Vaughan* v. *Wood* (*i*), where the father of the vicious dog's owner

e. 2 Macq. 14 [1855].
f. 9 Q. B. 101 [1846.]
g. L. R. 3 H. L. 330.
h. 19 Ont. R. 39 [1889.]
i. 18 S. C. R. 703 [1893.]

allowed it to be about his premises and it injured the respondent, it was held, affirming the judgment of the New Brunswick Supreme Court, that the dog had been harboured so as to render the appellant liable.

It is not necessary to show an actual previous bite to enable the plaintiff to recover. It is enough to show that the dog, to the knowledge of the owner, has evinced a savage disposition by attempting to bite persons, and straining at his chain (*j*).

"The watch-dog's honest bark" may seem very euphonious to the owner, but may give a right of action to neighbors if continued so as to be a nuisance (*k*). Indeed, in the Supreme Court of New York, it has been held that a summary remedy can be resorted to, and that a dog so offending can be killed, if it cannot be otherwise prevented from continuing his barking and howling. "It would be mockery," said Wilson, J., "to refer a party to his remedy by action. It is far too dilatory and impotent for the exigency of the case.

A man can only keep a fierce watch-dog for protection of his grounds and house at his peril, and an innocent person going there and being bitten may recover (*l*). A visitor or licensee bitten by such a dog has an action, and it would seem that even a trespasser is not without rights (*m*), although the fact of the trespass may affect the quantum of damage. There are many other phases of dog law, as to ownership, trespassing, theft, rabies, carriage by railway, cruelty, and other things which might also be considered, but the sketch will be long enough as it is.

The dog has been the subject of legislation much more in England than in North America, but on this continent there is a growing fondness for ownership and breeding of dogs, and no doubt our laws could and will be made more uniform and complete.

In Quebec, the Civil Code, Art. 5558, provides that a justice of the peace, on complaint that a dog is vicious, or is in the habit of attacking persons or animals at large or in harness, without the limits of his master's property, may order it to be confined for 40 days or to be killed. If it is proved that the dog has bitten any person outside the limits of its master's property, the justice of the peace shall condemn the owner or possessor to kill it.

In Ontario, the power to legislate is conferred upon municipali-

j. Worth v. Gilling, L. R. 2 C. P. 1 [1868.]

k. Smith v. Tugwell, 2 Selw. 1070.

l. Stiles v. Cardiff, 33 L. J. 310 [1864.]

m. 4 Bing. 628.

ties. By-laws may be passed (*a*) for restraining and regulating the running at large of dogs, (*b*) for imposing a tax upon the owners, possessors or harbourers of dogs, (*c*) for killing dogs running at large contrary to the by-laws, (*d*) for seizing and impounding dogs running at large contrary to the by-laws, and for selling dogs so impounded, or any of them, at such time or times, and in such manner as may be directed by any by-law in that behalf (*n*). This last clause was, in all probability, conferred in consequence of the action of *Brook* v. *City of Toronto*, where the plaintiff claimed some $4,000 damages actual and prospective, for alleged injuries to an aristocratic brood dog, called "Lady Dora," for injuries sustained in the city dog pound. The corporation at that time had no direct power to impound. The plaintiff recovered a small verdict.

It is understood that many municipalities have by-laws empowering magistrates to order the destruction of vicious dogs, whether they are "at large" or not, and that many executions have taken place under such by-laws where the dogs are chained and confined. It is probable, however, that the power is confined to dogs running in streets and public places only, where their presence would be a menace to the public safety and convenience.

The expression "at large," as applied to dogs, is doubtful in meaning and extent. In England a very narrow meaning would be given, for in *Hay* v. *Bennett* (*o*) Lord Coleridge said the words "under control" must be so effective as to prevent the mischief at which the statute aimed, and in the absence of very positive evidence to the contrary, the fact that a dog was neither muzzled nor led, was sufficient to prove that it had not been under proper control. In *McAneany* v. *Joshua Jewett* (*p*) a dog on the premises of its owner and playing with the owner's child, is not "at large" under an ordinance requiring the killing of all dogs going at large which were not licensed and collared, and the plaintiff recovered for the shooting of the dog by the defendant, a policeman. In *Commonwealth* v. *Dow* (*q*) the Judge instructed the jury that, if upon the facts of the case they were satisfied that the dog was by the side of his owner or of his servant having the special charge of him, or was near to him that he might be controlled and prevented from doing mischief, although he was not tied, he was not, in point of law, at large; but

n. 55 Vict. cap. 42, sec. 489; 56 Vict. cap. 35, sec. 17.

o. 3 Times L. R. 24 [1887.]

p. 10 Allan, Mass. 151 [1865.]

q. 10 Metc. Mass. 382 [1845.]

if they were satisfied that he was following his master through the streets loose, and at such a distance as that such control could not be exercised as would prevent mischief, he was at large within the law. Again, in *Wright* v. *Clark* (*r*), the plaintiff's foxhound was shot by the defendant when in full pursuit of the fox. The defendant, besides pleading that the shooting was accidental, said it was justifiable, as the dog was "running at large" contrary to the terms of a statute then in force. The Court of first instance held that, if the master were near enough to be in view, and the dog was neither doing nor threatening injury to others, the shooting was unjustifiable. On appeal, Ross, J., affirming the judgment, said, "The dog is the most tractable of animals, and yields most readily to restraint other than physical. The voice or look of the master are often more potent to restrain him than cord or chain..... The trained hound, when pursuing the fox or deer at his master's bidding, is no more 'strolling without constraint,' or 'wandering, roving or rambling at will' than a boy while going on an errand at his master's command..... The fact that the dog was out of sight and hearing of his master is not determinative of whether he was 'running at large.' He was in hot pursuit of the fox, with all his instincts urging him thereto, as each bound brought him nearer the coveted prize." Although one cannot help suspecting that this Judge has expressed himself as a fox-hunter as well as a Judge, yet it is difficult to find an argument against his interpretation. Interest in perusing this last cited case is enhanced by an incident which took place in the jury room. The "twelve," it seems, wished to say that the shooting was unintentional, but somewhat careless. Discussion becoming warm as to how to express this idea, a copy of Webster's Unabridged Dictionary was brought to them. The word "wanton" was chosen, and they brought in a verdict that "The shooting of the dog was a wanton act."

The points in the foregoing may be said to be:

1) To recover for injuries to a person, it must be proved that the owner or harbourer of the dog knew that he had previously bitten, or tried to bite, mankind.

2) For injuries to sheep this need not be shown.

3) Once a dog has destroyed his record for being gentle, the owner or harbourer keeps him at his peril, and negligence need not be averred or proved.

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r. 50 Vermont, 130 [1877.]

4) It is not necessary to show a previous bite. Showing disposition to bite is sufficient.

5) The continued barking of dogs may be an actionable nuisance.

6) Watch-dogs are kept on the premises of the owner at his peril.

7) There can be no defined rule as to whether a dog is or is not "at large." — *The Canadian Law Times.*

THE COLORED BAR OF CHICAGO.

JAMES B. BRADWELL.

Over thirty colored men and one colored woman have been regularly admitted to the Illinois bar, and are now practing law in Chicago. Considering the fact that less than forty years ago a large majority of the race in this country to which these lawyers belong were slaves, and that several of the lawyers themselves had been slaves, the race prejudice they had to overcome and the difficulties they had to encounter, with no rich or influential friends to give them a helping hand, the record they have made at the bar is an honor to the colored race and well may their example be held up to the colored men and women of other cities as worthy of imitation. We doubt if any other city has as large a number of colored lawyers.

Many of these lawyers are not only graduates of Law Colleges but of Universities as well, and some of them have been teachers; many were pioneers in occupying positions which colored men had never before been allowed to hold.

We inserted no person's name in this article until after we had examined his or her license, or the roll of the supreme court, to show that he or she had been regularly admitted.

While preparing this article we addressed letters to Hon. Harvey B. Hurd, the senior professor of the law department of the Northwestern University; to Hon. Thomas A. Moran, the dean of the Chicago College of Law, and to Hon. Marshall D. Ewell, the dean of the Kent College of Law, representing the three law colleges of this city from which colored law students had graduated, asking their opinion of colored men as students and lawyers, and received replies which are given at the conclusion of this article.

We place the names of the colored lawyers of Chicago in this article in the order in which they were admitted to the bar, and Lloyd G. Wheeler's name, like Abou Ben Adhem's name, "leads all the rest."

1. Lloyd G. Wheeler,
2. Richard A. Dawson,
3. Ferdinand L. Barnett,
4. Louis Washington,
5. Edward H. Morris,
6. J. W. E. Thomas,
7. Maurice Baumann,
8. John G. Jones,
9. R. O. Lee,
10. George W. W. Lytle.
11. S. Laing Williams,
12. Franklin A. Denison,
13. Charles P. Walker,
14. Edward G. Alexander,
15. Lewis W. Cummings,
16. W. W. Johnson,
17. S. A. T. Watkins,
18. William H. Ward,
19. M. A. Mardis,
20. Albert G. Hubbard,
21. James H. Lewis,
22. J. Gray Lucas,
23. Hale Giddings Parker,
24. James E. White,
25. W. B. Akers,
26. Charles W. Strutchin,
27. R. M. Mitchell,
28. William G. Anderson.
29. Thomas L. Johnso.
30. Miss Ida Platt,
31. John L. Turner,
32. Beauregard F. Moseley,
33. E. H. Wright.

Lloyd G. Wheeler, after an examination in the usual manner, having obtained a certificate of good moral character from County Judge Bradwell, was admitted to the Illinois bar April 20, 1869, and opened an office in Chicago at 69 Monroe street. He was the first colored man ever admitted to the Illinois bar. He led the way and made it easy for others of his race to follow in his footsteps. The *Legal News*, in welcoming him to the bar, said: "Mr. Wheeler is an intelligent and worthy gentleman, an honor to his race and no disgrace to the bar of Illinois. He is the first negro ever admitted to the bar in this State. We wish him success."

In 1870 Mr. Wheeler went to Arkansas and was county attorney of Pulaski county one term and presidential elector for Grant in 1872; served one year on the board of commissioners of Pulaski county, Arkansas. Mr. Wheeler married the niece of John Jones, now deceased, one of the most wealthy and respected of Chicago's colored citizens, who had been a slave, and by working over hours at tailoring, purchased his own freedom. Mr. Jones was appointed notary public by Governor Palmer, and elected a member of the board of commissioners of Cook county. It was at his house in this city that John Brown was secreted when a reward was offered for his delivery. Mr. Jones died in 1879, wealthy, and, at the time of his death was carrying on a profitable business. Since the death of Mr. Jones, Mr. Wheeler has given his undivided attention to carrying on the business which Mr. Jones devoted to the best years of his life to building up. Had it not been for this business connection Mr. Wheeler would undoubtedly have been, to-day, one of the leading lawyers of the city, with an excellent clientage.

Richard A. Dawson, the son of a colored Methodist minister, graduated from the Law Department of the University of Chicago in June, 1870. He was admitted to the Illinois bar July 11, 1870. A certificate of good moral character was awarded to Mr. Dawson by the Supreme Court of this city, with a view to his admission, upon motion of B. W. Ellis, then and now of the Chicago bar, once a slaveholder in the State of Arkansas. Mr. Dawson served one term as State Senator of Arkansas. He was the second colored man ever admitted to the bar in Illinois.

Ferdinand L. Barnett, Jr., was born in Nashville, Tenn., in 1855. His father was a slave until reaching his majority when he applied his extra earnings to buy himself, an opportunity which was sometimes offered by accommodating masters. Later, with his family, he moved to Canada in order to educate his children. After a common school course in Windsor, his son, F. L. Barnett, came to Chicago and graduated from the West Division High School in 1874. He then taught school two years in the South. Returning to Chicago he took the regular course in the Union College of Law and graduated therefrom in 1878, and was admitted to the Illinois bar June 11th of that year.

The next two years were spent in literary work as editor of *The Conservator*, which paper he founded in 1878, with Dr. James E. Henderson, now of Springfield, Ill., and Abram T. Hall, now of Pittsburg, Pa. That journal is the second oldest paper published by colored people in the country, and is conceded to be among the most influential organs of the race. Since its first issue to the present Mr. Barnett has been connected with it as editor or proprietor.

In 1881 he began the active practice of law, and has been so engaged up to the present. For a number of years he was associated with S. Laing Williams, under the firm name of Barnett & Williams. He devoted himself principally to civil practice, and has a good paying clientage.

Mr. Barnett has been twice married. His first wife was Miss Mary H. Graham, the first colored person to graduate in the regular course of the University of Michigan. Her death from heart disease occurred in 1890. In June, 1895, he married Miss Ida B. Wells, whose crusade against the lynching evil is known the world over. Shocked by the awful barbarity of that species of outlawry, brought home to her by the lynching of three highly respected young colored men of Memphis, because of a neighborhood quarrel, Miss Wells started out to call the attention of the American people to the dan-

gerous growth of this evil. Denied a hearing in America she went to England, and there from pulpit, platform and in the public press, her appeal was effectively made.

Mr. Barnett is a Republican in politics and was selected as the representative of his race to take charge of the special work in the Afro-American Bureau under the National Republican Campaign Committee at the Auditorium. Mr. Barnett is an able, active and efficient worker and has done much to advance the welfare of his race. His office is at 113 Adams St.

Louis Washington was born in Enon, Alabama. His complexion is no counterfeit. It is plain, genuine black. He was a slave until 1863, when, inspired by the love of freedom, not having heard of President Lincoln's proclamation freeing the slaves, but having been told there was a large army at Vickburg which liberated all the slaves who came within its lines, he left his master's services unbidden, walked barefooted from Enon to Vicksburg, and there entered the service, as a cook, of the 72d regiment of Illinois Volunteers under Colonel Stockton, afterward commanded by Colonel Sexton, our ex-postmaster, and served with that regiment, sometimes as cook and sometimes with a musket in his hands, until the end of the war in 1865. After the war he alternated for a number of years between work and school. He would work and earn money, then spend it getting an education, and then work again.

In 1872, having made some progress in his studies with the little fortune of $540 in the bank, he went to Wheaton College, where he remained for five years studying mathematics, Astronomy, Latin, Greek and German. The bank in which he deposited failed, and he lost $285 of his money, which compelled him to forego the completion of the college course.

In 1876 he left college and taught school for one year in Missouri, and with the money saved in teaching he paid his way in the Union College of Law for two years. In June, 1879, he took the examination before the Appellate Court and was admitted to the Illinois bar June 18, 1879. His office is at 81 Clark street, where he has been for fourteen years. The money made in his practice he invested in Chicago real estate.

Compare his condition now, with the poor, barefooted runaway slave, thirsting for freedom.

Edward H. Morris was born a slave in Kentucky in 1859, of slave parents. He attended the common schools of Ohio and Illinois, and has lived in Chicago twenty-six years. Mr. Morris was

admitted to the Illinois bar June 12, 1879, after an examination before the Appellate Court when it was held in what Judge Gary used to call Drake Tower. He was then so poor that he was unable to purchase a suit of clothes to make himself presentable; he kept on his long overcoat and remained during the examination with it buttoned up before, so as not to show the fractures which time and ware had made in his antique pants. Contrast the situation of this poor law student with that of the Mr. Morris of to-day!

Last year he received in cash for his professional services over ten thousand dollars, not including his salary as South Town Attorney. He is worth between forty and fifty thousand dollars in Chicago real estate; has a large law library of his own and a large well-selected miscellaneous library, in which such works as Shakespeare, Carlyle, Dickens, the poets and a good array of reference books find a place.

He was admitted to the bar of the Supreme Court of the United States October 15, 1885, and to the Wisconsin bar in September, 1881, and has considerable legal business to transact in that State. Mr. Morris has held a number of positions of trust and responsibility and has always performed his duties with ability and with the strictest integrity.

In 1892 he was attorney for the town of South Chicago. In 1895 he was assistant attorney for Cook county, and is now attorney for the town of South Chicago. Mr. Morris was elected a member of of the Illinois legislature of 1891, and served with credit to himself and the race he represented. He has succeeded in building up a profitable practice; has the respect of the bench and bar, and is the leader of the colored bar of Chicago. His practice is largely among the white race.

Mr. Morris has always been ready to lend a helping hand to the struggling law students of his race. Among those who have studied in his office are Fred. L. McGhee of St. Paul, his brother, William R. Morris, of Minneapolis, F. A. Denison, of Chicago, and Paul Jones, of Kansas City, who are all now successful colored lawyers.

J. W. E. Thomas was elected and served in the Illinois House of Representatives, 1876-78, with credit to himself and satisfaction to his constituents. He made a useful member. He was admitted to the Illinois bar February 2, 1880. He is among the wealthies colored men of the city of Chicago and made his fortune principally by signing bail bonds at the Harrison Street Police Station, and investing the proceeds in real estate.

No man doing business at the Harrison street station is better liked by the police department and those attending the station, than Mr. Thomas. Notwithstanding the character of his business and the length of time Mr. Thomas has been in it, he is regarded by all who know him as a man of honor and integrity. He has no equal in the business in which he is engaged in this city. He is a man of more than ordinary ability.

Maurice Baumann was admitted to the bar at Providence, R. I., January 1, 1877, and after practicing some years in that State removed to Chicago and was admitted to the Illinois bar on motion at Mt. Vernon, November 16, 1883. Mr. Baumann is a good English scholar, writes a fine hand and has a good paying business. His main office is at 134 Van Buren street. He has an evening office at 4765 Tracy avenue, Town of Lake.

John G. Jones was born in Ithaca, N. Y., in 1854, and is a large, strong and healthy-looking colored man. He was admitted to the Illinois bar March 25, 1884. Mr. Jones is one of the most fearless men we have at the bar, and is about the best known colored attorney here by reason of the frequent clashes he has had with the police department. Woe unto the man who steps on his toes, and thinks because he is a colored man he will not resent it. He is ever ready to defend his rights.

Mr. Jones has devoted a large portion of his time to criminal law, and has defended black and white, for every crime in the calender from murder down, with uniform success. His office is at 191 Clark street. He stands upon the top round of the Masonic ladder of colored Masons, having taken the 33d and last degree in Masonry. He was at the session of the Supreme council of the 33d degree of the A. A. S. Rite for the Southern and Western Masonic Jurisdiction of the United States of America, held at the Grant Orient in Washington, D. C., on October 21, 1895, elected Most Puissant Sovereign Grand Commander, and re-elected in October, 1896.

Many claim that the colored Mystic Shriners have received their authority more directly from the fountain head in Arabia, than the white Mystic Shriners have, for Rofelt Pasha, an Arab, and Deputy from the Grand Council in Arabia, in Chicago, on June 1, 1893, conferred upon Mr. Jones the Mystic Shrine degree, and so far as our knowledge extends, he was the first colored man in the United States to receive this degree. Mr. Jones has a patent of authority from the Grand Council in Arabia, empowering him to institute temples and confer this degree upon colored Masons in this country.

He now holds the office of Imperial Grand Potentate of North and South America. He has already instituted thirty-six temples of the Mystic Shrine in the United States. In far away Arabia, a colored Mason is considered as respectable as a white mason.

In Ancient Craft Masonry there is nothing which prevents a free-born colored man from receiving any of the Masonic degrees. Race prejudice would very generally cause the colored candidate to be black-balled in a white lodge; notwithstanding this, however, at least three colored brothers have been raised to the Master's degree in white lodges in Illinois. A colored man has been elected Master of a lodge of white Masons in New Jersey.

R. O. Lee was born in 1862, went through the junior year in the university of South Carolina, and was admitted to the Illinois bar September 18, 1884. He has a clientage both white and colored. His office is at 77 Clark street.

George W. W. Lytle was admitted to the bar at Nashville, Tennessee, January 13, 1877, and coming to Chicago, was admitted to the bar of Illinois September 22, 1884. He is a good scholar, writes a neat hand, and transacts business like a gentleman. His office is in the McCormick building, 69 Dearborn street.

S. Laing Williams entered the University of Michigan with the class of 1881, graduated with that class and received the A. B. degree. In the fall of 1881 he was appointed as principal of the Tullabody Academy of Greensboro, Ala. After teaching at this institution for one year he was appointed as an examiner in the adjudicating department of the U. S. Pension Bureau at Washington, D. C. He held this position from August, 1882, until August, 1885, when he resigned and came to Chicago to practice law. He entered the law department of the Columbian University, Washington, D. C., in the fall of 1882, and was the first colored man that ever gained admission to that University. Much resistance and excitement were caused by his admission but he was permitted to stay and graduated with his class in 1885, winning the second of the three prizes offered in the prize contest for legal theses.

He afterward took the post graduate course in the same school, making three years of legal study. He was admitted to the bar of the District of Columbia on examination June 18, 1885, and admitted to the Illinois bar January 19, 1886. Mr. Williams is a fine student, and in scholarly ability has no superior among the colored lawyers of Chicago. He is the husband of Mrs. Fannie Barrier Williams, who is the first and only colored woman ever admitted to

membership in the Chicago Woman's Club. Mrs. Williams is a lady of refinement and culture. She is a graduate of the college department of the Normal School at Brockport, N. Y., and took a special course in drawing and painting at the New England Conservatory of Boston, and was a school teacher in the public schools of Washington, D. C., for six years. Mr. Willams' office is at 113 Adams street.

Franklin A. Denison is a colored man of exceptional educational attainments. He was born in San Antonio, Texas, June 26, 1861. He attended to public school there until he was sixteen years of age and then apprenticed himself to a carriage maker, where he learned the trade. In 1883 he left Texas and entered Lincoln University, at Oxford, Pa.; from 1883 to 1888 he studied at Oxford, and in June of that year graduated with honor. Upon leaving there came to Chicago and took a course in the Union College of Law, graduating from there in March, 1889.

He was admitted to the Illinois bar March 29, 1889, and soon after commenced the practice of law in Chicago. He was first appointed as one of the assistants to the city prosecuting attorney by Mayor Washburn in 1889, being retained under Mayors Harrison and Hopkins, and appointed under Mayor Swift to the position of chief assistant prosecuting attorney. He has filled this position with credit to himself and the race to which he belongs. He has the confidence of the bench and the bar of this city.

Mr. Denison is the only colored man who has ever held such an appointment in the law department of the government of this city. He was married to Alice Taylor in Chicago in 1891.

Charles P. Walker was admitted to the Illinois bar October 8, 1890. His office is at 614 First National Bank building.

Edward G. Alexander was born in Chicago, is a graduate of the high school, went to the Athenæum and to Bryant & Stratton's Business College, took the two years regular course at the Chicago College of Law, and afterward the post graduate course, and was admitted to the Illinois bar March 18, 1891; was in the office of Col. Augustus Jacobson for ten years and has given considerable time to the practice of criminal law. He is a member of the law firm of Johnson & Alexander with offices at 112 Dearborn street.

Lewis W. Cummings received the degree of A. B. from Fisk University, Nashville, Tenn., in June, 1885. He came to Chicago in January, 1887, began the study of law in the office of Meech, Asay & Rice, entered the Chicago College of Law and graduated with the

class of 1889, which was the first class to graduate from that institution. After graduation he spent one year with Siegel, Cooper & Co. He entered the registry department of the postoffice in 1890, and has since devoted his days to practice and his evenings to working for Uncle Sam. Mr. Cummings was admitted to the Illinois bar in May, 1891.

W. W. Johnson, a law partner for some time of Edward G. Alexander, is a bright fellow and wide awake; is college-bred; graduate of a law school in the District of Columbia; was admitted to the bar of the supreme court of the District of Columbia, February, 16, 1892, and of the supreme court of Illinois, May 2, 1893. The offices of the firm are at 112 Dearborn street.

S. A. T. Watkins was born in Memphis, Tenn., of a slave mother, January 25, 1869; graduated from the LeMoyne Institute May 30, 1888; taught school one year in Memphis; read law for two years in the office of T. F. Cassels, assistant attorney general of Tennessee; was admitted to the bar of Tennessee, February 5, 1891, and appeared, and was enrolled as an attorney in the supreme court of that State, May 30, 1892. In July of that year he removed to Chicago, was admitted to the Illinois bar June 15, 1893, and has been practicing law in this city ever since. His office is at 79 Dearborn street.

William H. Ward is now assistant county prosecutor under county attorney Robert S. Iles. He was born in Lynchburg, Va., October 10, 1870. Graduated from the high school of that city in June 1890, and from the Law Department of Howard University, Washington, D. C., 1892; coming to Chicago, he was admitted to the Illinois bar June 16, 1893.

M. A. Mardis graduated from the Law Department of the Northwestern University in June, 1893, and was admitted to the Illinois bar June 16th of that year. His practice has been mostly at the police court at the Harrison street station. He has made considerable money signing bail bonds in criminal cases at the police station. His office is at 400 Dearborn street.

Albert G. Hubbard was born in Cincinnati, Ohio, in 1858. His parents were born and raised in Illinois. He was educated at Oberlin, passed through the public schools there and then spent two years at Oberlin College; taught school thirteen years in Oberlin and came to Chicago in 1889; was clerk for P. H. White, justice of peace, one and one half years; was clerk for Thomas Bradwell, justice of the peace, for two years; during these two years he

attended the Chicago College of Law, from which he graduated in 1893, and was admitted to the Illinois bar, June 22 of the same year. It was through the advice of Thomas Bradwell that Mr. Hubbard studied law. He was clerk in Justice Foster's court at Harrison street station thirteen months under appointment from Mayor Harrison.

Mr. Hubbard has a fair practice. It is more with Italians than with colored clients. His office is at 151 Clark street.

James H. Lewis was born in Loudoun County, Virginia, in 1849, and a slave until he was eight years old. His father was a free man, his mother a slave. His father was a blacksmith, and with the money earned in the blacksmith shop he purchased his wife, his son, James H., and his little brother. James H. went to Palatine, Illinois, in 1859, and worked for Mr. Crosby for a time; enlisted in the army in 1863; was mustered out in 1866 as sergeant of Company B, 3d Cavalry, U. S. Volunteers. He is as proud of the fact that he was at the siege of Vicksburg as he is that he is a member of the Chicago bar. He graduated from the Chicago College of Law in the class of 1892, and was admitted to the Illinois bar June 26, 1893. His office is at 2817 State street. The transformation of Lewis from a slave to a soldier and from a soldier to a practicing lawyer in Chicago seems more like a romance than a reality.

J. Gray Lucas graduated from the Industrial University of Arkansas at Pine Bluff, in 1884, and from the Boston University Law School in 1887. He came to Chicago, and, having been previously admitted to the Arkansas bar, he was, on motion, admitted to the Illinois bar, October 23, 1893. He has a neat office at 100 Washington street, in the Tile and Trust Company's building, and doing a good business.

Hale Giddings Parker's father was a slave. His name is John P. Parker. He is now living in Ohio, engaged in the foundry business at Ripley. He was a slave in Mobile, Ala., and bought himself for $1,800. He came north and worked in the foundry of the McCagg Bros. as a moulder, saved money and established a foundry of his own, and finally bought the McCagg foundry for $10,000. He has been in Ohio since 1849, and was, up to the breaking out of the war, an active conductor on the underground railroad. There was at one time a reward of $3,000 offered by the slave power for his capture.

Hale Giddings Parker and his brother John were sent to Oberlin College, in the spring of 1867; as soon as John reached his Sophomore year he left Oberlin and went to Harvard where he died. Hale

remained at Oberlin and graduated from there in 1873. Edward A. Shedd, of the Knickerbocker Ice Company, was one of his classmates, and graduated the same year. His father must have been a double-barreled abolitionist or he would never have named his son Hale Giddings.

After Mr. Parker left college he went to teaching school in Madison, Indiana, where he was principal of the colored school; from there he went to Louisville, where he taught for a short time; from there he went back to Madison, Ind.; taught there for one year and then went to St. Louis where he accepted a principalship in the Dumas School, and taught there for sixteen years; all the years before he had been "nibbling" at the law, but in St. Louis he studied law for three years in the St. Louis Law School, graduated therefrom in June, 1885, and was admitted to the St. Louis bar in that year. He practiced there during his vacations and worked in the office nights and mornings while teaching school; this school had over one thousand scholars.

He was appointed by President Harrison Alternate Commissioner at Large of the World's Fair, and was the only colored member of the National Board from the United States. He sat as commissioner at all the sessions of the board but two.

Mr. Parker, upon presenting his Missouri license was admitted to the Illinois bar by the supreme court of this State at Ottawa. He is an eloquent speaker, an able lawyer and a good American citizen.

He married Eleanor O. Steel, a collegiate student of Oberlin College. They were married at Christmas time in 1877. They have three children, two of whom are girls who are attending the high school at Hyde Park. His office is at 125 Clark st., Morrison Bld'g.

James E. White was born in Powellsville, N. C., April 16, 1865. Both of his parents were slaves but he himself knew nothing about slavery.

He was educated at a Normal School, Plymouth, N. C.; entered the preparatory department of Howard University in 1883 and remained there four years; finished this course and entered upon the regular University course which he finished four years later, and received the degree of B. A.

In 1891 he entered the law department of Howard University and graduated from there in 1893, receiving the degree of LL.B. After leaving the law school of Washington he went to Boston and attended a course of lectures at the Boston Law School on International Law.

Mr. White came to Chicago, and although he was a post graduate he took the examination before the Appellate Court and was admitted to the Illinois bar March 26, 1894. His office is at 49 Dearborn street with Franklin A. Denison.

His father's master's name was James E. White, and Mr. White was named after him.

W. B. Akers obtained his education in the public schools of Chicago and graduated from the high school. He was admitted to the Illinois bar June 13, 1894. He has a finely fitted up office at 167 Dearborn street and looks like business.

Charles W. Strutchin has a liberal education; spent three years in the University of Washington; left the state of Washington, went to Michigan, received the degree of Bachelor of Laws from the University of Michigan in 1893, and the degree of Master of Laws in 1894; was admitted to the Michigan bar June 10, 1893; came to Chicago, and was admitted to the Illinois bar November 22, 1894, where he has since resided, and has an office at 79 Clark street. His clients are not confined to colored people.

R. M. Mitchell exercises considerable influence in politics here. He is a good speaker. He has held a number of positions of trust, and performed the duties with ability and fidelity.

In 1887-8 he was deputy collector of taxes for the South Town of Chicago; for seven years a deputy clerk of the Criminal Court; three years chief clerk of Harrison street police station; for four years deputy collector and chief clerk of gaugers, and storekeeper.

Mr. Mitchell was admitted to the Illinois bar March 26, 1895, having passed the examination before the Appellate Court of this city.

He is quite an orator, and it is perhaps not too much to say that he can "make the American Eagle soar higher and scream louder" than any other colored lawyer in Chicago.

William G. Anderson was born in New Orleans, came to Chicago, graduated from the public schools here, studied law in Judge Payne's office and was four and a half years as stenographer and typewriter. He passed the examination of the Appellate Court at the March term and was admitted to the Illinois bar March 28, 1896. Subsequent to the employment with Judge Payne; he was law clerk and stenographer in the Probate Court four years, and private secretary to clerk Roger Sullivan. Mr. Anderson has the respect of the bench and bar of this city. While getting his education he had to support his mother and two sisters. He is a member of St. Thomas'

Episcopal church. He is a notary public, has a large acquaintance and is doing well. His office is at 77 Clark street.

Thomas L. Johnson graduated from the public schools of Chicago, attended the law department of the Northwestern University, graduated from that institution in June, 1896, and was admitted to the Illinois bar June, 1896. His office is at 167 Dearborn street.

Miss Ida Platt was born in Chicago, of colored parents, Sept. 29, 1863; educated in the public schools of this city, and graduated from the high school with honor, at the age of sixteen, in the same class with Horace S. Oakley, of the law firm of Ball, Wood & Oakley, the well known lawyer, Joseph W. Errant, and Dr. Mary Mixer.

Miss Platt studied music under Mme. Eugenie de Roode Rice. In 1883 she entered the insurance office of Mr. Holger de Roode; was for nearly nine years his private secretary and stenographer and also had charge of the claim department. In 1892 she entered the law office of Jesse Cox as stenographer, and commenced the study of law in the Chicago College of Law. In July, 1893, she established herself in the Ashland Blk. as general stenographer and law reporter.

Miss Platt graduated from the Chicago College of Law June 15, 1894, and received her license to practice at the Illinois bar in June of that year. One of the judges of the supreme court, when he signed his name to the license admitting Miss Platt, said: "We have done to-day what we never did before — admitted a colored woman to the bar; and it may now be truly said that persons are admitted to the Illinois bar without regard to race, sex or color."

In noticing the admission of Miss Platt we said: "We are glad to welcome Miss Platt as the first colored woman ever admitted to the Illinois bar, and are pleased to be able to say that she is a woman of very decided ability, being an excellent short hand reporter, proficient in German, French and music, agreeable in manner; she will enter upon her professional career with talents possessed by few. We wish her abundant success."

Miss Platt since her admission to the bar has been in the office, in the Unity building, of that well known lawyer and member of the Board of Education, Joseph W. Errant. Mr. Errant speaks in the highest terms of Miss Platt.

John L. Turner was born in Dallas, Texas, of slave parents. The parents took the name of their master, Turner. The father was sold to William McKane, of Frankfort, Texas, and is still living. Both parents were in law emancipated by Abraham Lincoln's proclamation, but in fact were kept in slavery until June, 1865. Young

Turner commenced his education in a district school in Texas, and as soon as he was competent took second grade examination before the county board of examiners to teach school; he commenced teaching in Lewisville, Texas, and taught in that state three years.

After he had taught and saved money enough to go to college he went to Wiley University in Marshall, Texas, completed the second year's course there, went to the New Orleans University and graduated in the Normal course in 1893; taught school another year and helped his father on the farm during the vacation. In 1894 he commenced to study law in Dallas, with Joseph E. Wiley (colored), a graduate of the Union College of Law of Chicago, and after remaining there one year he came to Chicago, entered the law office of Barnett & Williams (colored), graduated from the Kent College of Law and was admitted to the Illinois bar June, 1896.

Beauregard F. Moseley is a colored man of more than ordinary ability, is a fair speaker, an active Republican, and has made a number of speeches during the campaign. He has been dabbling in the law for a number of years both in New Orleans and Chicago. Mr. Moseley says he was admitted to practice in the District Court at New Orleans in November, 1890; that he studied law in the office of Mr. Furgeson for fifteen months in Georgia and in the office of the U. S. District Attorney at New Orleans. He has held several positions of trust under the Government at New Orleans. He now holds the position of Assistant Town Attorney for the Town of Lake and has succeeded in building up quite a little law practice here and is capable of doing a good business.

He was educated in the public schools and at Payne Institute, Augusta, Georgia. He has taught school both in Louisiana and Georgia. Mr. Moseley was examined in the class before the Appellate Court, October 14, 1896, and received the certificate of qualification to practice law, which has been forwarded to the supreme court at Ottawa, and he will probably receive his license before we go to press. His office is at 6303 S. Halsted street.

E. H. Wright is an active Republican politician of considerable ability; he might be termed a hustler. He was examined in the class before the Appellate Court of this district, October 14, 1896, and received the necessary certificate of qualification for admission to the bar, which has been forwarded to the supreme court. His office is at 205 Clark street. — *Chicago Legal News*.

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NOTES.

With this number we present an article on Judge Cooley and his writings. As a matter of general reading this would perhaps not be a success, but as furnishing a very complete list of the writings of Judge Cooley, to whose ability we of Michigan owe so many important decisions, it should prove eventually a valuable paper. When the biographies of notable men of Michigan are written, this should prove of value as giving opportunity for forming a proper estimate of one of our most brilliant jurists.

In Detroit, the recent failure of Mabley and Company and their resumption of business under a new name, are matters which have already passed into local history. Is there no lesson which lawyers may gather from the facts which have passed before them?

A receiver was appointed. A lawyer? No, the Union Trust Company. Did it act more efficiently or carefully than any good lawyer would have done? For one week's work however its charge was $4500.00, which was as a local paper said "inclusive of attorney's fees," and a charge of "only two per cent. of the assests *including the dynamos.*" We submit that the charge was an excessive one: that the judge was culpable is alllowing it; and that any good lawyer would never have been permitted to charge even half that sum.

Here is the same question before us that was considered last

month. Why do lawyers tolerate without a murmer a continuance of such a system as, carried to its legitimate conclusion, would do away with all possibility of their making a livlihood in their chosen profession ?

We are growing here in the United States year by year more familiar with trusts and combinations; with the extension of corporations to all lines of work; with the absorption by department stores of the business done formerly by a hundred men in as many different stores, each one carrying on its diversified trade. We are growing familiar with the gradual lessening of a profitable field for labor or the combination of labor and a small capital and with the evils which attend such lessening of opportunity; and yet we have tolerated a further extention and permit it to continue in the matter of such companies as the Union Trust Company, and the lawyers are not alive to the danger which threatens them. Where will it all end ?

LEGAL MISCELLANY.

Some important questions of revenue policy will be treated by David A. Wells in the installment of his "Principles of Taxation" to appear in Appleton's Popular Science Monthly for January. Among these are the use of the taxing power for purposes ulterior to providing for the expenses of the government, such as supporting particular industries, enforcing morality, controlling paper currency, etc.

To the members of the legal profession there is an unusual interest in several features of the January "Review of Reviews." Chief among these is the symposium from twelve or fifteen of the most authoritative scholars and public men in the United States, on the question, "What Congress Should Do about the Currency and Tariff." This is such a vital problem, and is so complicated by ex parte considerations, that it will be extremely valuable to have collated the definite opinions of so many men who are capable of giving an authoritative programme, and who are above ulterior considerations. Scarcely less valuable is Hon. Theodore Roosevelt's article on "Social Unrest," which is largely inspired by a most remarkable letter received by Mr. Roosevelt from Hon. Thomas A. Watson of Georgia, on the occasion of a previous essay of Mr. Roosevelt's dealing with the vice-presidency. These two features are extremely important from informational and suggestive points of view.

In a different field of interest Baron Coubertin has an attractive brief description of a fine old Englishman whom this Frenchman considers a typical Briton and who conducted a sort of rural system of Olympic games in his country home. A somewhat novel and rather striking subject is broached in Mr. Frank Terry's article on "Renaming the Indians"; Miss Laura Dennis tells of the extraordinary advances which have been made in methods of vocal instruction owing to the ability to record the vibrations of the vocal cords, and the other contributions to this number are all new and useful.

Few people are aware that in two countries at least laws have been passed giving women the right to propose marriage. In case

of refusal to accept the hand of the suitor, a heavy fine was imposed upon the unfortunate man. Among the ancient records of Scotland a searcher has recently discovered an act of Scottish parliament, passed in the year 1288, which reads as follows: "It is statut and ordaint that during the reign of his maist blissit Begeste, ilk for the yeare knowne as lepe yeare, ilk mayden ladye of bothe highe and lowe estait shall hae liberte to bespeke ye man she likes, albeit he refuses to taik hir to be his lawful wyfe, he shall be mulcted in ye sum ane dundis or less, as his estat may be; except and awis gif he can make it appeare that he is betrothit ane ither woman he then shall be free." A few years later a similar law was passed in France and received the approval of the king. It is also said that before Columbus sailed on his famous voyage a similar privilege was granted to the maidens of Genoa and Florence. There is no record of any fines imposed under the Scotch law or trace of statistics of the number of spinsters who took advantage of it or the French enactment. Four hundred years later it is referred to in a curious treatise called "Love, Courtship and Matrimony," published in London in 1606. The "privilege" is thus alluded to: "Albeit it now becomes a part of the common law in regard to social relations of life, that as often as every leap yeare doth return, ladyes have the sole privilege during the time it continueth of making love either by words or lookes as to them seemeth proper, and moreover no man will be entitled to benifit of clergy who doth in any wise treat her proposal with slight or contumely." It is only a century ago that one of the unwritten laws of leap year was that, if a man should decline a proposal, he should soften the disappointment of the fair suitor by presenting her a silk dress.—*Legal Adviser.*

The case of *Cone* v. *Citizens' Bank, 46 Pac. Rep. 414*, recently decided by the Court of Appeals of Kansas, furnishes a striking illustration of judicial incompetency, resulting in part, doubtless, from the evils of an elective system in that state. The suit was a possessory action for personal property, and the defendant submitted to the lower court ninety-four special questions for submission to the jury. This angered the wise judge, and in submitting the questions to the jury, he used the following language: "I want the jury to understand that these questions are got up to befuddle and mislead the jury, so that there will be error in the trial of this case, so that the verdict may be set aside." In reversing the case the court of appeals administered a sharp rebuke to the trial judge saying that "by this statement the judge assumes that the verdict will be for the plaintiff below, and that the defendant below wants error committed in the trial, so that the verdict may be set aside, and that the questions were submitted to the jury to accomplish the result. It is well recognized that juries have a great respect for the opinion of the trial court, and are always on the alert for some intimation as to

what the trial court thinks of the case. From the remark of the trial court the jury must have concluded that the court supposed, of course, that the judgment ought to be rendered for the plaintiff below; and this and several other remarks of the court, which were complained of, indicated very strongly to the jury that the trial court thought the judgment ought to be for the plaintiff below, and we are unable to say that their action was not influenced by the remarks of the court." Any improper remark of the court in the presence and hearing of the jury liable to influence their action is misconduct and therefore judges should take care to say nothing in the hearing of the jurors, while the case is progressing, which can possibly be construed to the prejudice of either party. *Cronkhite* v. *Dickerson*, *51 Mich. 177*, *16 N. W. Rep. 371*. Error will lie on the demeanor of the trial judge if it be such as to prevent a fair trial, or prejudice the case upon the facts before the jury. *Wheeler* v. *Wallace*, *53 Mich. 355*, *19 N. W. Rep. 33*, *37*. These cases are cited approvingly in *Walker* v. *Coleman*, *55 Kan. 381*, *40 Pac. Rep. 640*, which case was reversed, and a new trial granted, because of improper remarks made by the same judge who tried this case.—*Central Law Journal*.

In view of the fact that in our last number we published an article on expert testimony from the expert's side of the question, we feel that the following will prove of interest to our readers.

"An interesting discussion on the subject of expert testimony is furnished by the Pennsylvania Law Series for October, which publishes a paper on the subject by Judge Gustav A. Endlich, of Reading, together with a reply thereto by Prof. Persifor Frazer, who may be considered as a representative expert. Judge Endlich regards expert witnesses as necessary evils. He thinks that courts in the disposition of complicated matters brought before them, "should have in a liberal measure the aid of competent and reliable opinion-evidence, and that, on the other hand, the existing system under which opinion-evidence is thrust upon them unnecessarily denudes it of much of the value it ought to possess and often makes it the enemy rather than the ally of justice."

Judge Endlich rejects the European system of having experts employed temporarily or permanently by the state as opposed to the principles upon which our jurisprudence is founded. He thinks that "the selection of experts to be heard in any particular case should remain substantially with the parties, the matter of numbers and qualification to be judiciously and judicially controlled, the expression of their opinions, however, to be put beyond the supicion of influence by the party selecting them — their examination to be conducted by counsel, with the right of cross-examination by the opposing counsel — their testimony to be subject to contradiction by experts selected on the other side in the same way — the credibility

of all experts examined to be liable to impeachment, as it is now — and their opinions to be weighed and passed upon by the jury like other evidence, and in connection with the other evidence in the case."

To effect this purpose he proposes that before the trial of a case requiring expert testimony; the names of qualified persons to give such testimony should be presented to the court, with an affidavit, declaring that none of them has been approached, directly or indirectly, in behalf of the party proposing them. The court, from the lists selected, would then make appointment of the experts to be examined (not stating at whose instance). Up to a certain limit the county should bear the expense of expert testimony; beyond the limit the expense should be borne by the party at whose instance they were selected. Some obvious modifications of this plan would be required in cases where the need of expert testimony could not be anticipated, and in land damage cases. To obviate the evils of hypothetical questions framed to elicit certain answers the experts should be required to attend the trial and given an opportunity to examine witnesses under the direction of the court, or, if unable to attend, should be furnished with copies of the testimony. Judge Endlich also proposes that the expert be given large liberty in explaining the case to the jury.

Professor Frazer naturally takes exception to some of the language used by Judge Endlich in characterizing experts as partisans engaged to tell just so much of the truth as shall be of service to their employer. He defends the reputation of men of standing who have acted as experts, and ascribes part of the evils of expert testimony to the exasperating cross-examination by lawyers tolerated by the court. Respecting the remedies for existing evils Professor Frazer agrees with Judge Endlich, that official experts are objectionable; nor does he think highly of Judge Endlich's plan as a practical solution of the difficulties. Prof. Frazer's plan in brief is this:

"Let no man be permitted to testify as an expert in a specific case without stating, first, the general principles on which his investigation or opinion is based; second, the observations, experiments or reasoning which have led him from these principles to his stated conclusions; third, that in his judgment these conclusions have some important bearing on the case at issue."

The adoption of this rule, in the opinion of Professor Frazer, would do away with the calling of eminent men for the sake of impressing the jury, without giving them an opportunity to express their opinions, and would make it difficult for a dishonest expert to testify. The subject is one of growing importance, because of the increasing complexity of questions submitted to the judgment of inexpert jurors, and it has by no means been exhausted in the papers of Judge Endlich and of Professor Frazer.

The subject does not derive all of its importance, however, from

the complexity of the questions now coming before juries. The whole system of expert testimony has for years been permeated with growing abuses that have finally attracted the attention of the reformers at the bar and that still cry loudly for a remedy. To be sure, not all experts are dishonest or influenced in their opinions and testimony by the side that calls them, but they are all human, and some system must sooner or later be devised that will free them from even the suspicion of evil and bias. Foo many experts under the present system regard themselves as sort of assistant attorneys for the side that called them and to which they may have to look for their pay rather than as a part of the machinery of the court for determining and dispensing of exact justice. Lord Beaconsfield is said to have remarked that "liars are of three classes — liars, damned liars and expert witnesses." Whether this be just or unjust, here is work for the reformer, and the young men who are now coming to the bar may profitably give thought to the subject, for he who suggests the proper remedy will deserve well of both the bar and public. — *The Law Student's Helper.*

BOOK REVIEWS.

A TREATISE ON THE LAW OF CIRCUMSTANTIAL EVIDENCE.—Illustrated by numerous cases by ARTHUR P. WILL, of the Chicago Bar. 555 pp. Published by T. & J. W. Johnson & Co., Philadelphia.

This work on Circumstantial Evidence is a great help to the profession. Of course, this class of evidence, depends very much upon the manner it is introduced and applied, and every case presents different combinations of facts, but these are well known principles that must be observed in collecting facts and making application of them, which requires very careful discrimination. The author has given much thought to the topics treated, and shows a large experience in his suggestions, and much research in his citations. Sometimes he seems to be more theoretical and scientific than the point under discussion demands, and takes more space to display learning than is warranted, yet on the whole he has produced a valuable book, and the bench and bar will no doubt find it to their advantage to possess it.

THE LAW OF EVIDENCE, IN CIVIL CASES, by BURR W. JONES, of the Wisconsin Bar, Lecturer on the Law of Evidence, in the Law School of the University of Wisconsin. Three volumes, 2198 pp. Published by Bancroft-Whitney Company, San Francisco, Cal.

These three volumes on the Law of Evidence, in Civil Cases, furnishes a convenient text book for trial lawyers, stating tersely the rules of law which govern in trial of civil cases. They are published in the same form as "The Law of Wills," and under volumes published by the same publishers.

This work does not claim to set forth a logical and concise treatise on the law of evidence, but it states the rules of evidence. as they are now established, by a long list of opinions, which are carefully selected from the earliest down to the latest well considered judicial decisions. The author in treating the various subjects, has not only stated the rules of evidence which govern, but has often given many illustrations from the reported cases. This work has been prepared as an aid to the busy lawyer. In fact it gives an elaborate brief on each subject, not only on the sound principles of law, but it sustains every proposition by all the precedents, both ancient and modern, applicable thereto.

RECENT MICHIGAN DECISIONS.

AGREEMENT AMONG HEIRS TO SETTLE ESTATE — PARTITION OF PROPERTY BY TRUSTEE — RIGHT OF HEIR AT LAW TO HAVE PARTITION SET ASIDE — FRAUD — RES ADJUDICATA.—A distribution of an estate between the heirs at law, made by a trustee, to whom the property has been deeded by all the heirs under an agreement, entered into at the same time, that the property is to be thereafter divided between the heirs into such shares as they may agree upon; such deed being given for the purpose of facilitating the partition and releasing the interest of certain minor heirs, will not be held to defeat the right of an heir at law to his portion of the estate, owing to the allowance of a claim held by the estate against him; it appearing that the deed and agreement were executed by him under the representation of all the heirs that it was a necessary step, and that, owing to his advanced age and infirm eyesight, the paper was signed by him without reading the same; that it was understood between himself and the trustee that no division should be made by the trustee without his consent, and that the claim, for which it was alleged he was indebted to the estate, was in greater part outlawed and uninforcible.

The claim that the matter is res adjudicta by reason of the refusal of the Judge of Probate to appoint an administrator to the estate upon application made subsequent to the execution of the papers, for the reason that the estate had been settled, cannot be sustained, the Probate Court having no jurisdiction in the premises. — *Shurte* v. *Fletcher*. December 9, 1896.

BAILMENT—MUTUAL BENEFIT BAILMENT—LIABILITY OF BAILEE FOR LOSS OF GOODS —BURDEN OF PROOF.—Where goods are sent and received for the purpose of examination and selection alone, the title remains in the sender and the custody of the goods is that of a bailment for the mutual benefit of the parties; the bailee is not an insurer of the safety of the goods, and is held to the exercise of ordinary care only, and the burden of showing a want of such care is on the bailor.—*Knights* v. *Piella*. Dec. 1, 1896.

BROKERAGE—COMMISSION ON SALE OF REAL ESTATE—EVIDENCE.—One who has not given the exclusive agency for the sale of land cannot recover a commission when the lands are subsequently sold through the instrumentality of another broker, who was employed by the owners of the land in good faith, in his capacity as a broker, and without any knowledge on their part that any communication had ever passed between the plaintiff and such broker, in relation to the sale of these lands, and after every offer ever made by the plaintiff for any prospective buyer had been rejected, for the reason that the price offered was several thousand dollars less than the price for which plaintiff was authorized to sell.

The fact that the purchaser of the land gave the broker all interest in the profits for his services would not make the broker a party to the original purchase.—*Douville* v. *Comstock*. Dec. 1, 1896.

BROKERAGE—COMMISSION ON SALE OF REAL ESTATE—TERMINATION OF CONTRACT— ACCEPTANCE OF SERVICES.—One holding an option on certain lands will be allowed to recover for services rendered in effecting a sale of the property, after the expiration of his option. It being shown that the services were rendered under an arrangement with the owner which was not terminated by him, and in pursuance of which a purchaser was found for the property acceptable to the owner.—*Nolan* v. *Swift*. Dec. 4, 1896.

CRIMINAL COMPLAINT—MITTIMUS—PROBABLE CAUSE. — 1. A criminal complaint should contain a statement of facts which, if false, could be the basis for an indictment for perjury.

2. The conclusion to be drawn from the recitals in the mittimus is that the defendant was committed only upon his own testimony, which would be clearly illegal.

3. It should appear from the mittimus, 1st, that a crime was committed by some one; 2d, that it was probable that the defendant was the guilty party. Probable cause refers to the guilt of the defendant, and not to the commission of the crime itself.—*People* v. *Schustek, et al.*

DEED—ADMISSIBILITY OF PAROLE EVIDENCE TO SHOW CONSIDERATION INCLUDED CHATTELS—CONVERSION—DEMAND.—Parole evidence is admissible to show the terms of an agreement made between the grantee of certain premises and the son of the grantor, entered into at the time of the execution of the deed, whereby the grantor was to put in a crop of wheat for one-third of the crop.

The consideration of a deed may be shown by oral testimony to include chattels not mentioned therein.

Any unlawful exercise of authority over the property of another is an act of trespass, and, if accompanied by taking and detention, will amount to a conversion.—*Breitenwischer* v. *Clough.* Dec. 1, 1896.

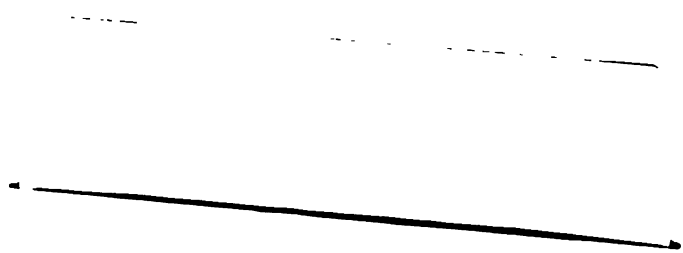
MUNICIPAL LAW — GRANTING OF LICENSE TO CITIZEN — INTERFERANCE BY MUNICIPALITY WITH PRIVILEGE — PASSAGE OF ORDINANCE — REMEDY OF CITIZEN. — A municipality cannot, under the guise of promoting public health, unreasonably interfere with the management and business of a private sewer, when such action violates the obligations of a license granted and acted upon.

While the city would have the right to superintend the construction of the sewer and to see that the connections with other private sewers from lot owners are properly made, and to regulate its use so as not to be injurious to its citizens, with these restrictions the owner obtained a vested right to the use of his property.

Inasmuch as the common council, by the passage and enforcement of an ordinance preventing the owner from further extending the sewer or connecting other private sewers with it, was acting in its governmental capacity, the action of the municipality would not give the owner a remedy by an action at law to recover damages. The only appropriate remedy would be by some proceeding to restrain the action of the council from interfering with the plaintiff's legal rights.—*Stevens* v. *City of Muskegon.* December 9, 1896.

PERSONAL INJURY TO MINOR—ACCEPTANCE OF RISK OF EMPLOYMENT—RECOVERY WHERE INJURY IS NOT THE PROXIMATE RESULT OF FAILURE TO SECURE CONSENT OF PARENTS — FAILURE TO GUARD MACHINERY — NOTICE BY INSPECTOR NECESSARY. — A boy 12½ years of age cannot recover for injuries sustained by reason of falling into the cog wheels of a machine, in a factory in which he was employed, where it appears that the accident was caused by a scuffle between himself and a fellow employe, and that he was personally aware of the danger incurred by coming in contact with the moving cog wheels.

A recovery could not be based upon the alleged violation by the employer of the provisions of Act No. 265, Laws of 1895, where the injury sustained was not the proximate result of the failure to obtain the written consent of the parents of the minor.

No liability would be incurred by the employer for failure to provide covering to the cog wheels, as provided in Sec. 1997 Howell's Statutes, in the absence of any notice of such defect from the inspector as required by subdivision 5 of that section. —*Borck* v. *Michigan Bolt and Nut Works.*

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